SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 394.

THE UNITED STATES, APPELLANT,

vs.

EDWARD P. BLISS, EXECUTOR OF DONALD McKAY, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1 In the Court of Claims.

MARY C. MCKAY, EXECUTRIX, AND EDWARD P. BLISS, executor of Donald McKay, deceased,
vs.
THE UNITED STATES.
} No. 16828.

I.—Petition.—Filed October 9, 1890.

To the chief justice and judges of the Court of Claims:

The petition of Mary C. McKay and Edward P. Bliss respectfully represents that letters testamentary were on the first day of November, in the year of Lord one thousand eight hundred and eighty, issued to them by the probate court for the county of Essex, Commonwealth of Massachusetts, upon the estate of Donald McKay, late of said county and State aforesaid. They further represent that they are citizens of the United States, and that decedent was also a citizen of the United States.

They further represent that on the twenty-second day of August, anno Domini one thousand eight hundred and sixty-three, the said Don-
2 ald McKay entered into two several contracts with the United States, one executed by John Lenthall, Chief of the Bureau of Construction and Repair of the Navy Department, for the construction and equipment of an iron paddle-wheel gunboat, the other executed by B. F. Isherwood, Chief of the Bureau of Steam Engineering of the Navy Department, for building and erecting in said vessel, called the "Ashuelot," all the machinery necessary for her propulsion. Copy of said contracts, marked Exhibits "A" and "B," are hereto attached and made part of this petition. Both contracts were to be carried out in conformity with drawings and specifications, and were to be completed within eleven months from date. The decedent had all the facilities for the due and proper performance of both contracts. He proceeded at once diligently to carry them out, and would have completed the vessel and her machinery within the contract time but for the delays caused by the defendant.

At the outset the officers of the United States were tardy in furnishing the specifications and drawings mentioned in the contract, and from time to time the work was delayed by failure to promptly furnish information and plans. They directed numerous changes and alterations, which consumed time and interfered with the progress of the original work. In consequence of these delays, caused solely by the Government, and to which the decedent did not contribute, the vessel and machinery were not completed until the twentieth day of November, anno Domini one thousand eight hundred and sixty-five. This prolonged term for the completion of the work was rendered necessary by delays resulting from the action of the Government of the United States. During the term specified by the contract, and also during the prolonged term, there was a continuous rise in the prices of all labor and material entering into said vessel and machinery.

The additional cost necessarily incurred by the decedent in the
3 completion of the side-wheel steamer "Ashuelot" and her machinery, by reason of the changes and alterations in the plans and

specifications, which he was required by the duly constituted officers of the United States to execute, and delay in the prosecution of the work was one hundred and thirty-two thousand four hundred and fifteen dollars and ninety-two cents ($132,415.92). Such additional cost in completing the same and such changes and alterations in the plans and specifications required and delays in the prosecution of the work were occasioned by the Government of the United States. So much of such additional cost as represents the advance in the price of labor and material is for such advance as occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid, and claimants aver that such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors.

So far as claimants are informed the compensation for the respective alterations was not in any instance fixed by the Government and the decedent in advance of the alterations.

All the alterations, when made, complied with the specifications of the same as furnished by the Government, and so far as claimants are informed none of the alterations or changes caused less work and expense to the contractor than the original plans and specifications.

All the moneys heretofore paid to the decedent for the hull and machinery of the "Ashuelot" by the Government, over and above the contract price, amounted to twenty-two thousand four hundred and fifteen dollars and ninety-two cents ($22,415.92).

By act of Congress approved August 30, 1890, this claim, inter alia, has been referred to this court. A copy of said act, hereto attached, is marked "Exhibit C."

4 The claimants further represent that this claim was presented to the Secretary of the Navy for his consideration under and in compliance with the act of Congress approved March 2, 1867, entitled "An act for the relief of certain contractors for the construction of vessels of war and steam machinery" (14 Stat., 424). He referred it to a board of naval officers, of which Commodore J. B. Marchand was president. The report of this board was transmitted to the President of the Senate December 4, 1867, and published as Senate Ex. Doc. No. 3, 40th Congress, second session. That board did not comply with the act of Congress and report the facts called for. It proceeded to make determinations, and, inter alia, determined nothing to be due to Donald McKay on account of the "Ashuelot."

Your petitioners pray the court that a judgment be rendered in their favor for the sum of one hundred and ten thousand dollars ($110,000).

MARY C. MCKAY.
EDWARD P. BLISS.

JOHN S. BLAIR,
Attorney, 1420 F street, Washington, D. C.

MASSACHUSETTS, *District Boston.* } ss:

Before me, a U. S. commissioner, personally came Mary C. McKay and Edward P. Bliss, who, being duly sworn, saith that they are the

petitioners in the foregoing petition, and that the statements therein contained are just and true to the best of their information and belief.

MARY C. McKAY.
EDWARD P. BLISS.

Sworn and subscribed before me this third day of October, A. D. 1890.

Henry L. Hallett, U. S. Commissioner, District of Massachusetts.

HENRY L. HALLETT,
U. S. Commiss., Mass. Dist.

5 Int. Rev. 5c. Stamp. Cancelled.

EXHIBIT A.

CONTRACT.

This contract, made and entered into at the city of Boston, in the State of Massachusetts, the twenty-second day of August, 1863, between Donald McKay, of the city of Boston, in the State of Massachusetts, as principal, and G. W. Questen, F. A. Sumner, O. Smith, Benjamin Pope, Daniel Lewis, Trickey & Jewett, and Eben Atkins, as sureties, of the first part, and John Lenthall, chief of the Bureau of Construction and Repair of the Navy Department, acting in the name of the Secretary of the Navy, for and in behalf of the United States of America, of the second part, witnesseth: That the said parties of the first part do hereby contract and agree with the said parties of the second part, that for the consideration hereinafter named they do hereby covenant and agree for themselves, executors, administrators, and assigns, to build, equip, and fit the hull, spars, spare spars, rigging, blocks, sails, spare sails, awnings, canvas work, boats, tanks, casks, and all the equipments and outfits connected therewith necessary for an iron paddle-wheel gunboat, to be delivered afloat, and completely supplied with equipments and outfits, except the anchors, cables, furniture, cooking utensils, instruments, stores, ordnance and ordnance stores, but in every other respect fit for sea service, except the steam machinery, which is the subject of another contract with the said parties of the first part.

The said parties of the first part further agree that the said vessel, equipments, and outfits shall conform in all respects to the specifications and drawings furnished, which constitute a part of this contract, and are to govern the parties hereby contracting as truly as if the same were incorporated in this instrument; nor is the omission therein of any
6 detail or object necessary to carry into effect this agreement to be to the detriment of the United States, but the same shall be furnished without any additional charge whatever.

The said parties of the first part further agree, that all the materials shall be of the very best quality and free from defects; that the equipments and outfits shall conform to those used in the United States Navy, so that they may be used in connection therewith, and each and all respectively bearing the tests made of similar articles in the naval service.

Int. Rev. Stamp. Cancelled.

It is further agreed by the parties of the first part, that the person or persons appointed by the Navy Department to inspect the work shall have the power of rejecting, in any stage of its progress, any materials

or articles that they may consider defective either in material or workmanship, and to whom every part and arrangement must be satisfactory; and they will provide the said inspectors a suitable and convenient office room, and afford them satisfactory facilities for superintending the work.

The said parties of the first part further agree and contract, that the aforesaid vessel shall, with the machinery on board, be completed in eleven months from the date of this contract, and shall be promptly delivered, at their expense, to the Navy Department, at the nearest navy-yard.

The parties of the first part further agree, that the magazines, shell-rooms, light boxes, shot-lockers, shot-racks, and all parts connected therewith, with the iron ring and other bolts, and all arrangements connected with the hull and appertaining to the armament, shall be in accordance with such instructions as may be given from the Ordnance Bureau of the Navy Department; that all the apartments, state-rooms, store and other rooms, and fittings of every kind, shall be conveniently arranged and fitted to the satisfaction of the inspector appointed by the Navy Department.

7 It is further agreed by the parties of the first part to hold the United States harmless against any demand for patent fees for any patented invention for any article or arrangement that may be used by them in the construction of this vessel, and before the final payment shall be made to furnish the Navy Department with the proper release from such patentee.

And the said parties of the first part do further engage and contract, that no Member of Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom. And it is hereby expressly provided, and this contract is upon this express condition, that if any such Member of Congress, officer of the Navy, or other person above named, shall be admitted to any share or part of this contract, or to any benefit to arise under it, or in case the parties of the first part shall in any respect fail to perform this contract on their part, the same may be, at the option of the United States, declared null and void, without affecting their right to recover for default that may have occurred.

It is further agreed, that in case of failure or neglect on the part of the party of the first part to fulfil the stipulations of this contract and have the vessel delivered as above stipulated, the Navy Department may, at its option, enter in and take possession of, and direct purchases to be made of all the necessary materials, and cause the vessel to be completed and fully equipped as heretofore described; and any excess of cost will be at the expense of the said party of the first part, provided the delay has not been occasioned by the action of the Navy Department.

And the said United States, by the parties of the second part, do hereby contract and engage with the said parties of the first part as follows:

That the total price to be paid for the hull, equipments, and outfits, completed under all the conditions of this contract and according
8 to the drawings and specifications, is to be one hundred and seventy-one thousand ($171,000) dollars. The payments to be made in six equal parts, as the work progresses, with a reservation of 20

per centum from each part of twenty eight thousand five hundred ($28,500) dollars.

But if the vessel should be completed in all respects as contemplated in this contract, before the time stipulated, then the above price of one hundred and seventy-one thousand ($171,000) dollars is to be increased at the rate of one thousand seven hundred and ten ($1,710) dollars per month, and in like manner, if the vessel should not be so completed, then the above price of one hundred and seventy-one thousand ($171,000) dollars is to be decreased at the rate of one thousand seven hundred and ten ($1,710) dollars per month. The bills for these payments to be presented in triplicate, certified by the superintendent appointed by the Navy Department that the one-sixth part of the value of this contract, in labor and materials, has been furnished in due proportion to the time, which bills, when duly approved by the parties of the second part, shall be paid to the said parties of the first part, or to their order, by the navy agent at Boston within ten days after the warrant for the same shall have been passed by the Secretary of the Treasury.

It is further mutually understood and agreed that the sixth payment is not to be made until the vessel is finished as this contract provides, and that to entitle the said parties of the first part to the twenty per centum reserved as above named, the hull, equipments, and outfits must be complete and satisfactory to the Navy Department; and the payment thereof, or as much as may be due, shall be received by the parties of the first part in full consideration of the complete fulfilment of this contract.

It is further agreed that the Navy Department shall have a lien on the vessel and on all the materials provided for the fulfilment of this contract, for the money advanced or paid by the United States on account thereof; and the said parties of the first part agree that they will keep the vessel and materials, or as much of them as are exposed and liable to injury, insured against fire and flood to the amount which may be paid on account of this contract until delivered to the Navy Department, the policies being made payable to the United States.

9

It is further agreed by the parties of the first part, as required by the 14th section of the act of Congress approved July 17, 1862, that neither this contract nor any interest therein shall be transferred to any other party or parties; and that any such transfer shall cause the annulment of the contract, as far as the United States are concerned; and that all rights of action are hereby reserved to the United States for any breach of this contract by the said parties of the first part.

Witness:

W. H. BANKS,	DONALD MCKAY.	[L. S.]
to D. McK. to G. McQ.	GEORGE MCQUESTEN.	[L. S.]

Signed, sealed and delivered in presence of—

W. H. BANKS.	F. A. SUMNER.	[L. S.]
SHUBAEL G. ROGERS to	OLIVER SMITH.	[L. S.]
G. W. DENNETT to	BENJAMIN POPE.	[L. S.]
W. H. BANKS to	DANIEL LEWIS.	[L. S.]
GEO. H. SOUTHARD to	TRICKEY & JEWETT.	[L. S.]
W. H. BANKS to	EBEN ATKINS.	[L. S.]
A. B. FARWELL.	JOHN LENTHALL.	

[Int. rev. stamp cancelled.]

Extract from a law of the United States, approved July 17, 1862.

SECTION 16. And be it further enacted—

That whenever any contractor for subsistence, clothing, arms, ammunition, munitions of war, and for every description of supplies for the Army or Navy of the United States, shall be found guilty by a court-martial, of fraud or wilful neglect of duty, he shall be punished by fine, imprisonment, or such other punishment as the court-martial shall adjudge; and any person who shall contract to furnish supplies of any kind or description for the Army or Navy, he shall be deemed and taken as a part of the land or naval forces of the United States for which he shall contract to furnish said supplies, and be subject to the rules and regulations for the government of the land and naval forces of the United States.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Benjamin Pope, being duly sworn, deposes and says that he resides in the city of Boston, in the State of Massachusetts; that he is a merchant, and that the value of his property, over and above all debts and liabilities incurred by him, is over forty-five thousand dollars.

[Int. rev. stamp cancelled.] BENJAMIN POPE.

Sworn and subscribed this 5th day of December, 1863, before me.

F. M. JOSSELYN, *J. P.*

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk:

Daniel Lewis, being duly sworn, deposes and says that he resides in the city of Roxbury, in the State of Massachusetts; that he is a merchant, and that the value of his property, over and above all debts and liabilities, is over forty thousand dollars.

DANIEL LEWIS.

Sworn and subscribed this 5th day of December, 1863, before me.

F. M. JOSSELYN.

[Int. Rev. Stamp Cancelled.] [Int. rev. stamp cancelled]

I certify that I have made due and diligent personal inquiry as to the ability of the sureties in this contract, and am satisfied that they are good and sufficient for the sum of one hundred and seventy thousand dollars.

E. L. NORTON, *Navy Agent.*

11 EXHIBIT B.

CONTRACT.

This contract, made and entered into at the city of Boston, in the State of Massachusetts, the 22d day of August, 1863, between Donald McKay, of the city of Boston, in the State of Massachusetts, as principal, and Geo. Questen, F. A. Sumner, Oliver Smith, Benj. Pope, Daniel Lewis, Trickey & Jewett, and Eben Atkins, all of the city of Boston,

and State of Massachusetts, as sureties of the first part, and B. F. Isherwood, chief of the Bureau of Steam Engineering, Navy Department, acting in the name of the Secretary of the Navy, for and in behalf of the United States of America, of the second part, witnesseth: That the said parties of the first part do hereby contract and agree with the said parties of the second part that, for the consideration hereinafter named, they do hereby covenant and agree for themselves, executors, administrators, and assigns, to build and erect, at their expense and risk, in a secure and finished state, fit in every respect for sea service in the United States, iron paddle-wheel steamer "Ashuelot," at their works in ; all the machinery necessary to the propulsion of the same by a single inclined paddle-wheel engine of fifty-eight inches diameter of cylinder, and eight feet nine inches stroke of piston, with two main boilers and two superheating boilers, together with all appurtenances, coal bunkers, instruments, tools, and spare pieces that may be required for proper working according to the usages of the naval service.

The said parties of the first part further agree that the said machinery, appurtenances, coal bunkers, instruments, tools, and spare pieces shall conform in all respects to the specifications and list of articles
12 hereunto attached, which constitute a part of this contract, and are to govern the parties hereby constructing as truly as if the same were incorporated in this instrument; nor is the omission therein of any detail, or object necessary to carry into effect the intent of this agreement, to be to the detriment of the United States; but the same shall be furnished by the said parties of the first part to the satisfaction of the said parties of the second part, without extra compensation therefor.

The said parties of the first part further agree that all the materials, workmanship, detail, and finish shall be of the first class; and the engines and boilers proportioned to furnish and sustain continuously a working pressure of forty pounds per square inch above the atmosphere.

The said parties of the first part further agree that the Secretary of the Navy shall have the right to appoint a person to superintend the construction of the machinery, who shall have power to inspect it at all times, and to peremptorily reject, at any stage of its progress, any materials, or articles, or any piece or part which he may consider defective, either in quality of iron and, or of workmanship, or in propriety of detail; and that they will provide the said person suitable and convenient office room, and [illegible] and [illegible] satisfactory facilities for superintending the work.

The said parties of the first part do further agree that they will make, or cause to be made, and deliver to the Navy Department within one month after the completion of the machinery, neat drawings on double elephant paper, and to scale, of every piece or part used in the construction thereof; also, general plans showing the combination and arrangement of the whole; all to be in sufficient detail, with dimensions figured on, to enable the same to be again constructed, together with an inventory of the weight and material of each part of said machinery and of all its appurtenances.

It is further agreed by the parties of the first part to hold the
13 United States harmless against any demand for patent fees for any patented invention for any article or arrangement that may be

used by them in the construction of the machinery of this vessel; and, before the final payment shall be made, to furnish the Navy Department with a proper release from such patentee.

And the said parties of the first part do further engage and contract that no Member of Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom. And it is hereby expressly provided, and this contract is upon the express condition, that if any Member of Congress, officer of the Navy, or other person above named shall be admitted to any share or part of this contract, or to any benefit to arise under it, or in case the parties of the first part shall in any respect fail to perform this contract on their part, the same may be, at the option of the United States, declared null and void, without affecting their right to recover for defaults which may have occurred.

And the said parties of the first part do further agree that the said machinery, appurtenances, coal bunkers, instruments, tools, and spare pieces, complete in all respects and ready for continuous sea service, shall be on board the vessel within months from the date of this contract, the hull of the vessel being the subject of another contract with the said parties of the first part, unless prevented by the act of the Government or by circumstances beyond the control of the parties of the first part, it being understood that by "circumstances beyond the control of the parties of the first part" is meant accidents, by fire or water, to the machinery on the premises of the parties of the first part, or while being erected in the vessel; but delays by persons furnishing the parties of the first part with stock or material or caused by loss of castings or forgings condemned for any reason whatever are not within the
14 meaning of the phrase "circumstances beyond the control of the parties of the first part."

And it is further agreed and mutually understood that in case the machinery shall not be fully completed in the vessel ready for sea service at the expiration of the said eleven months after the said parties of the first part are notified that the vessel is at their command, the said party of the second part is authorized to take possession of said machinery and complete it at the expense of the said parties of the first part.

The said parties of the first part do hereby guarantee the following points:

First. A successful and satisfactory operation at sea of the machinery and appurtenances during the trial of one hundred and forty-four consecutive hours, under steam of the maximum pressure that the boilers can be made to furnish, not exceeding forty pounds per square inch above the atmosphere, during which time the lubrication is to be thorough and easy, the journals free from heating, the stationary parts free from working or motion on their fastenings, and the whole performance of such a character as to demonstrate the satisfactory strength, reliability, practical efficiency, and durability of the entire machinery.

Second. That during the period of three months from the termination of the above trial there shall be no deterioration or depreciation of the materials of which any of the machinery and its appurtenances are composed beyond that of ordinary friction. And that there shall be no

fracture of any of the parts from imperfection in design of detail or from faulty workmanship.

Third. That the vacuum during the trial of one hundred and forty-four hours aforesaid shall at no time be less than 26½ inches of mercury.

The entire responsibility of fulfilling the above guarantees is to rest with the said parties of the first part, who will make their own working drawings, rigorously adhering to the specifications hereunto annexed, and the general drawings furnished, forming part of this contract, for such parts as are therein given, taking particular care that all the parts come accurately together with the proper clearances and symmetry.

It is also further agreed and mutually understood, that in the event of a failure from imperfection in the design of the detail, malconstruction of the machinery, fault of workmanship, or by reason of the quality and composition of the materials used, at any time during the trial trip of one hundred and forty-four hours, and within the stipulated three months thereafter, the Navy Department is authorized to have all modifications, alterations, substitutions, and repairs made, to the extent that will give permanently a satisfactory operation, and the sum or sums paid therefor shall be at the expense of the said parties of the first part.

It is further agreed and mutually understood, that during the trial trip of one hundred and forty-four hours the parties of the first part shall have the right of having the machinery placed under the management and control of an engineer appointed and paid by them, who shall, during such trial, be subject to the regulations of the naval service, and such personal and official supervision of the engineers appointed by the Navy Department as may be directed by the Secretary of the Navy, and to secure a fair and satisfactory test of the machinery.

And the said United States, by the parties of the second part, do hereby contract and engage with the said parties of the first part, as follows:

That the total price to be paid for the machinery, appurtenances, coal bunkers, tools, and spare pieces, completed under all the conditions of this contract, and according to the drawings and specifications, is to be $104,000. The payments to be made in six equal parts as the work progresses, with a reservation of twenty per centum from each part of $17,333⅓. But if the machinery, appurtenances, coal bunkers, tools, and spare pieces should be completed in all respects, as contemplated in this contract, before the time stipulated, then the above price of $104,000 is to be increased at the rate of $1,040 per month; and in like manner, if the machinery, appurtenances, coal bunkers, tools, and spare pieces should not be so completed, then the above price of $104,000 is to be decreased at the rate of $1,040 per month.

The bills for these payments to be presented in triplicate, certified by the superintendent appointed by the Navy Department that the one-sixth part of the value of the contract in labor and materials has been furnished and done in this contract; which bills, when duly approved by the parties of the second part, shall be paid to the said parties of the first part, or their order, by the Navy agent at the city of Boston, within ten days after the warrants for the same shall have been passed by the Secretary of the Treasury.

It is further mutually understood and agreed that the last payment is not to be made until the machinery, appurtenances, coal bunkers, tools, and spare pieces are furnished as this contract provides; and that to entitle the said parties of the first part to the twenty per centum reserved as above-named, the machinery, appurtenances, coal bunkers, tools, and spare pieces must be complete and satisfactory to the Navy Department, and the machinery must have operated during the said three months as guaranteed, without deterioration or fracture; and the payment thereof, or as much as may be due, shall be received by the parties of the first part in full consideration of the complete fulfillment of this contract.

And it is further agreed that within forty-five consecutive days after the vessel is delivered fully completed the Navy Department will have prepared it for sea and commenced the trial of one hundred and forty-four hours; and in default of this, any additional time that may
17 elapse shall be deducted from the three months aforesaid intervening between the next to the last and the last payments.

And the said parties of the first part do further agree that the Navy Department shall have a lien on the machinery, and all the materials, etc., provided for the fulfilment of this contract, for the money advanced or paid by the United States on account thereof; and that they, the said parties of the first part, will keep the machinery, materials, etc., insured against loss by fire to the amount which may be paid on account of this contract, the policies, in case of loss, being made payable to the Government.

It is further agreed by the parties of the first part, as required by the 14th section of the act of Congress approved July 17, 1862, that neither this contract nor any interest therein shall be transferred to any party or parties; and that any such transfer shall cause the annulment of the contract, as far as the United States are concerned; and that all rights of action are hereby reserved to the United States for any breach of this contract by the said parties of the first part.

Signed, sealed, and delivered in the presence of—

W. H. BROOKS to	DONALD MCKAY.	[L. S.]
W. H. BROOKS to	GEO. W. QUESTEN.	[L. S.]
W. H. BROOKS to	F. A. SUMNER.	[L. S.]
SHUBAEL G. ROGERS to	OLIVER SMITH.	[L. S.]
G. W. DENNETT to	BENJAMIN POPE.	[L. S.]
W. H. BROOKS to	DANIEL LEWIS.	[L. S.]
GEO. H. SOUTHARD to	TRICKEY & JEWETT.	[L. S.]
W. H. BROOKS to	EBEN ATKINS.	[L. S.]
F. M. JOSSELYN to	HENRY JONES.	[L. S.]
F. B. F. I.	B. F. ISHERWOOD.	[L. S.]
EDW. B. NEALLY.		

Extract from a law of the United States, approved July 17, 1862.

SECTION 16. *And be it further enacted*, That whenever any contractor for subsistence, clothing, arms, ammunition, munitions of war, and for every description of supplies for the Army or Navy of the United States shall be found guilty by a court-martial of fraud or wilful neglect of duty, he shall be punished by fine, imprisonment, or such other punish-

ment as the court-martial shall adjudge; and any person who shall contract to furnish supplies of any kind or description for the Army or Navy, he shall be deemed and taken as a part of the land or naval forces of the United States for which he shall contract to furnish said supplies, and be subject to the rules and regulations for the Government of the land and naval forces of the United States.

18 EXHIBIT C.

[Private—No. 604.]

AN ACT for the relief of Nathaniel McKay and the executors of Donald McKay.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of Nathaniel McKay and the executors of Donald McKay for further compensation for the construction of the iron-clad monitors Squando and Nauset, and the side-wheel steamer Ashuelot, may be submitted by said claimants within six months after the passage of this act to the Court of Claims, under and in compliance with the rules and regulations of said court; and said court shall have jurisdiction to hear and determine and render judgment upon the same: *Provided, however*, That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draught monitors Squando and Nauset and the side-wheel steamer Ashuelot in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: *Provided*, That such additional cost in completing the same, and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors: *And provided further*, That the compensation fixed by the contractors and the Government for specific alterations in advance of such alterations shall be conclusive as to the compensation to be made therefor: *Provided*, That such alterations, when made, complied with the specifications of the same as furnished by the Government aforesaid: *And provided further*, That all moneys paid to said contractors by the Government over and above the original contract price for building said vessel shall be deducted from any amounts allowed by said court by reason of the matters hereinbefore stated: *And provided further*, That if any such changes caused less work and expenses to the contractors than the original plan and specifications a corresponding deduction shall be made from the contract price, and the amount thereof be deducted from any allowance which may be made by the said court to said claimants.

Approved, August 30, 1890.

19 II.—*Traverse.—Filed October 29, 1890.*

In the Court of Claims of the United States. December term, A. D. 1889.

EXRS. OF DONALD MCKAY
vs.
THE UNITED STATES. } No. 16828.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

20 III.—*Motion for leave to amend original petition and allowance of same.*

Now come the claimants and move the court for leave to amend the original petition filed in this case by making the following addition; and further pray that the printing of this amendment may be dispensed with:

"The claimants further assert that they and they only are the owners of the claim hereinbefore mentioned, and that no other person is interested therein except so far as there is a resulting interest to the legatees under the will of Donald McKay, deceased. They further set forth that no assignment or transfer of such a claim or any part thereof has been made to any other person; that the claimants are justly entitled to the amount therein claimed from the United States; that they and their decedent were, or are, citizens of the United States, and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government, and they believe the facts set forth in the petition to be true to the best of their knowledge.

MARY C. MCKAY,
EDWARD P. BLISS,
Executors.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County, to wit:

Before me, Robert P. Clapp, notary public, personally came Edward P. Bliss and Mary C. McKay, and severally swear that the foregoing amendment is a true and correct statement to the best of their knowledge.

In witness whereof I hereunto set my hand and official seal this 9th day of January, A. D. 1891.

ROBERT P. CLAPP,
Notary Public.

Allowed.
WILLIAM A. RICHARDSON,
Chief Justice.

Filed January 15, 1891.

21 IV.—*Motion to amend title of case filed February 2, 1896, and allowance of same.*

Now comes the claimant, Edward P. Bliss, by his attorney, John S. Blair, and respectfully represents that on the 17th of September, 1890, there was filed with the clerk of this court, in the cause No. 16821, wherein Mary C. McKay and Edward P. Bliss were plaintiffs, a certificate from the register of probate court in and for the county of Essex, State of Massachusetts, to the effect that letters testamentary had issued to him, the said Edward P. Bliss and Mary C. McKay, on the estate of Donald McKay, late of said State and county, deceased, on the 1st of November, 1880, which letters were then in force.

He further represents that on the 3rd day of April, anno Domini one thousand eight hundred and ninety-four, the probate court in and for said county and State, at a probate court held at Salem, Massachusetts, in said county, ordered and directed that the resignation of the trust of executrix of the will of Donald McKay, late of Hamilton, in said county, thereto presented by the said Mary C. McKay, be accepted, leaving Edward P. Bliss to act as sole executor, as appears by a certified copy of the proceedings of said court, which were on the 11th day of April, 1894, filed in the cause aforesaid, No. 16821.

Wherefore your petitioner prays that the ti'le of this cause be amended so as to read: Edward P. Bliss, executor of Donald McKay, deceased, against the United States.

JOHN S. BLAIR,
Attorney for Claimant.

Filed February 2, 1896.
Allowed.

CHARLES C. NOTT,
Chief Justice.

22 V.—*Findings of fact and conclusion of law.—Filed April 18, 1898.*

Court of Claims.

EDWARD P. BLISS, EXECUTOR OF DONALD MCKAY,
v.
THE UNITED STATES. } No. 16828.

This case having been heard by the Court of Claims, the court, on the evidence, makes the following

FINDINGS OF FACT.

I.

On August 22, 1863, Donald McKay contracted with John Lenthall, Chief of the Bureau of Construction and Repair, acting in the name of the Secretary of the Navy and in behalf of the United States, for the construction of the hull, spars, and complete equipment and outfit, except the machinery, of an iron, double-ender, paddle-wheel gunboat, afterwards called the "Ashuelot," to be completed in eleven months from that date, for the sum of $171,000, which contract is set forth in the petition herein.

II.

On the same day, August 22, 1863, the said Donald McKay contracted with B. F. Isherwood, Chief of the Bureau of Steam Engineering, acting in the name of the Secretary of the Navy and in behalf of the United States, for the construction of the machinery, appurtenances, etc., of the said gunboat, to be completed in eleven months from that date, for the sum of $104,000, which contract is set forth in the petition herein.

III.

The said contractor fulfilled both of the said contracts, and was paid the full contract price for the work, viz, $275,000.

Changes and additional work were ordered from time to time during the construction of the vessel and machinery, for which changes and additional work the further sum of $25,407.54 was also paid.

The cost of changes and additional work, over and above what has been paid therefor, was $4,153.05.

IV.

On account of these changes and additional work required by the Government, and also on account of other delays for which the defendant was responsible, the completion of the vessel was delayed from July 22, 1864, to November 29, 1865, or a period of sixteen months
23 and seven days beyond the expiration of the contract period of eleven months, and it does not appear that the contractor could have avoided this delay.

The contractor owned the shipyard where the "Ashuelot" and the "Nauset" were built, and his facilities for completing the "Ashuelot" within the time specified in the contract were ample.

V.

The "Ashuelot" and the light-draft monitor "Nauset" were built in Donald McKay's shipyard, in East Boston, Mass. During their construction, between August 30, 1864, and March 30, 1865, work for private parties was being done in said shipyard, in the construction of two small wooden tugboats, one propeller steamer, and one small screw steamer, upon which there was employed from time to time an average of about twenty men. But said work does not appear to have materially interfered with or delayed the work on the two vessels then being constructed in said shipyard for the defendant.

VI.

During the contract period of eleven months, and to some extent during the succeeding sixteen months and seven days, the Government made frequent changes and alterations in the construction of the vessel and delayed in furnishing to the contractor the plans and specifications therefor, by reason of which changes and delay in furnishing plans and specifications the contractor, without any fault or lack of diligence on his part, could not anticipate the labor, nor could he know the kind, quality, or dimensions of material which would be made necessary to be used in complying with said changes.

While the work was so delayed during and within the period of the contract as aforesaid the price of labor and material greatly increased, which increased price thereafter continued without material change until the completion of the vessel sixteen months and seven days subsequent to the expiration of the contract period. The increased cost to the contractor as aforesaid was by reason of the delays and inaction of the Government and without any fault on his part.

The cost to the contractor because of the enhanced price of labor and material as aforesaid was for labor, excluding cost of superintendents, clerks, and draftsmen, $12,608.71, and for material, $14,815.66, or for both labor and material, $27,424.37, which increase price of labor and material could not have been avoided by the contractor by the exercise of ordinary prudence and diligence.

VII.

The cost to the contractor for superintendents, clerks, and draftsmen after the expiration of the contract period until the completion of the vessel was $5,480.06.

The necessary cost to the contractor for insurance during the same period was $1,917.97.

VIII.

On the foregoing findings the court allows the following items:

Finding III.	Cost of changes and extra work	$4,153.05
Finding VI.	Labor	12,608.71
	Material	14,815.66
Finding VII.	Superintendents, clerks, etc	5,480.06
	Insurance	1,917.97
		38,975.45

No allowance is made for rent of shipyard, shops, or plant or for interest paid on money borrowed during the said periods of delay, nor for the contractor's time, though interest was so paid and the shipyard and contractor's time was each of substantial value.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant recover judgment against the United States in the sum of thirty-eight thousand nine hundred and seventy-five dollars and forty-five cents ($38,975.45).

24 VI.—*Judgment of the court.*

EDWARD P. BLISS, EXECUTOR OF DONALD MCKAY, deceased,
vs.
THE UNITED STATES. } No. 16828.

At a Court of Claims held in the city of Washington of the 18th day of April, A. D. 1898, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, finds for the claimant, and do order, adjudge, and decree that the said claimant, Edward P.

Bliss, executor of Donald McKay, deceased, do have and recover of and from the United States the sum of thirty-eight thousand nine hundred and seventy-five dollars and forty-five cents ($38,975.45).

BY THE COURT.

25 VII.—*Defendant's motion, filed May 25, 1898, to amend the findings of fact, and order overruling same.*

Now comes the Attorney-General on behalf of the defendant, and moves this honorable court to amend the sixth line of the fifth finding in this case by substituting the words "about forty-five men" for the words "about twenty men," for the following reason:

The statement that about twenty men were employed from time to time on the private work done in Donald McKay's shipyard during the construction of the "Ashuelot" is evidently based on the local inspector's reports on the hull only, and without regarding the similar reports made by the same inspector upon the machinery, these reports having been separately made because there were two contracts, one for the hull and the other for the machinery. Taking these two sets of reports together, the number of men reported as employed on the different dates in the various reports is as follows: October 29, 1864, 46; November 14, 1864, 33; November 29, 1864, 34; December 13, 1864, 34, to which 4 blacksmiths and 6 boiler makers should presumably be added; December 30, 1864, 47; January 13, 1865, 61; January 29, 1865, 55. The average of these seven reports gives nearly 45 men employed on private work.

L. A. PRADT,
Assistant Attorney-General.

CHARLES C. BINNEY,
Special Attorney in Charge of Case.

26 *Order of court on foregoing motion.*

The number of men employed on private work goes only to the value of the claimant's time and rental of shipyard, and as neither has been fixed by the court the question will still lie open if the case comes before the court again.

BY THE COURT.

MAY 31, 1898.

VIII.—Application for and allowance of appeal.

EDWARD P. BLISS, EXECUTOR OF DONALD MCKAY, dec'd,
vs.
UNITED STATES.
} No. 16828.

From the judgment rendered in the above-entitled cause on the 18th day of April, 1898, in favor of the claimant, the defendants, by their Attorney-General, on the 16th day of July, 1898, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed July 16, 1898.

The defendants, by their assistant attorney-general, having made application in vacation for the allowance of this appeal, it is allowed this 8th day of August, 1898.

CHARLES C. NOTT,
Chief Justice of the Court of Claims.

27 In the Court of Claims.

EDWARD P. BLISS, EXECUTOR OF DONALD MCKAY, dec'd,
vs.
THE UNITED STATES.
} No. 16828.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of judgment of the court, and of the application for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 2d day of September, 1898.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) Case No. 16979. Court of Claims. Term No. 394. The United States, appellant, vs. Edward P. Bliss, executor of Donald McKay, deceased. Filed September 9, 1898.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 394.

THE UNITED STATES, APPELLANT, v. EDWARD P. BLISS, EXECUTOR OF DONALD McKAY, DECEASED.

STIPULATION.

It is hereby agreed by and between the parties to this cause that the following facts appear in the records of the Court of Claims, and that they may be added to the record in this cause and be treated upon the hearing with the same effect as if they had been included in the facts found by the Court of Claims:

IX.

The appellee in this cause brought suit in the Court of Claims for further compensation for the construction by Donald McKay of the iron-clad monitor "Nauset," under the provisions of the act of Congress approved August 30, 1890, set out at page 11 of this record. The Court of Claims entered judgment on the 14th of May, 1894, in that cause (No. 16821) in favor of the claimant and against the United States for $123,628.42, and filed findings of fact. The findings showed that the judgment for $123,628.42 was composed of the following items:

Additional cost of extras and changes over the sums already received	$41,375.00
Cost to the contractor because of the enhanced price of labor and material which occurred during the prolonged term for completing the work	64,977.92
Clerk hire, superintendence, &c	17,275.50
	123,628.42

On the 2nd of July, 1894, the Attorney-General moved for a new trial, alleging that each of the three items composing the judgment was not sustained by the evidence. On the 28th of November, 1894, the Attorney-General moved to amend the findings so that $20,000 should be substituted for $41,375, $25,000 should be substituted for $64,977.92, and in place of $17,275.50 substitute $10,000. In support of his claim that the item $64,977.92 was excessive he alleged that the evidence

showed that not more than $25,000 of that sum was for enhancement of cost after the termination of the original contract period (p. 17), and that thus the claimant received "allowance for large quantities of goods and labor purchased in the contract term and not in the prolonged period to which he is confined by the statute" (p. 19).

After argument of the motion the Court of Claims announced the following deductions:

$41,375.00 less	$17,142.44 equals	$24,232.56
64,977.92 less	3,406.25 equals	61,571.67
17,275.50 less	1,550.00 equals	15,725.50
$123,628.42	$22,098.69	$101,529.73

and gave *the* to the claimant the alternative of remitting the judgment to $101,529.73 or the allowance of the defendants' motion for a new trial.

3 The claimant filed such remittitur January 31, 1895, and on the 5th February, 1895, the court filed new findings of fact.

X.

The final findings by the Court of Claims and conclusion of law in that cause were as follows:

4 Court of Claims.

EDWARD P. BLISS, EXECUTOR OF DONALD MCKAY, deceased, *v.* THE UNITED STATES. } No. 16821.

FINAL FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I. The Secretary of the Navy, on the 4th of July, 1861, in his message to Congress, recommended the appointment of a proper and competent board to inquire into the subject of floating batteries or ironclad steamers and make a report. Under the act of August 3, 1861, a board was appointed. An advertisement was published August 7, 1861, inviting the submission of designs. Seventeen proposals were received, all of which were rejected except three. The recommendations of the board were approved, and three contracts were entered into.

The New Ironsides, built by Merrick & Sons, was an ironclad broadside frigate carrying 11-inch guns. The Galena, built by C. S. Bushnell, was a small corvette plated with iron. The Monitor, built by John Ericsson, was of a novel design and characterized by the revolving turret and low free board.

Nothing appears to have been done in the way of expending the money appropriated by the act of February 12, 1862, until the conflict between the Monitor and Merrimac on the 9th of March, 1862, demonstrated the utility of Mr. Ericsson's invention.

The Department, as soon as the engagement was over, gave to Mr. Ericsson an order for six more monitors, one of which was called the

Passaic. The original monitor was built in one hundred days. The vessels of the Passaic class were built in six months.

In these cases Capt. Ericsson had made the detailed drawings before taking the contracts. In the fall of 1862 the Navy Department entered into contracts for the construction of nine vessels known as river and harbor monitors, which were to be modifications of the Passaic class.

During the year 1862 the necessity for some light-draft armored vessels for operations on our Western rivers and the shallow bays and sounds of the Atlantic and Gulf coasts became so urgent that the Navy Department determined to provide some for that purpose if possible. Application was made to Mr. John Ericsson, the inventor of the original monitor, for a plan of a light-draft monitor to carry one turret and to have a draft of from 6 to 6½ feet. On the 9th of October Mr. Ericsson submitted to the Department a plan which was not intended as a working plan, yet it defined the general principle and the mode of building the vessel, engines, boilers, and propeller.

5 II. The Navy Department issued the following advertisement:

"*Light-draft vessels for rivers and bays.*

"NAVY DEPARTMENT, *February 10, 1863.*

"The Navy Department will receive proposals for the construction and completion in every respect (except guns, ordnance stores, fuel, provisions, and nautical instruments) of armored steamers, of about 700 tons, of wood and iron combined, having a single revolving turret.

"On personal application at the Navy Department in Washington or to Rear-Admiral Gregory, No. 415 Broadway, New York, parties intending to offer can examine the plans and specifications which will be furnished to the contractors by the Department.

"No offer will be considered unless from parties who are prepared to execute work of this kind, having suitable shops and tools, of which, if not known to the Department, they must present evidence with their bid.

"The act of Congress approved July 17, 1862, prohibits the transfer of any contract or order, or interest therein.

"The bidders will state the price and the time within which they will agree to complete the vessel or vessels, and the bid must be accompanied by the guaranty required by law, that if awarded to them they will promptly execute the contract.

"Proposals will be received until the 24th day of February, and they must be indorsed 'Proposals for vessels for river defense,' to distinguish them from other business letters."

III. From the bids thus received uniform prices were established of $386,000 and $395,000, and during the months of March, April, May, June, and July, 1863, contracts were made for the building of 20 light-draft monitors upon the same plan. Mr. Stimers was placed in charge of their construction, and the contractors were directed to look to him for instructions. He was ordered to consult with Mr. Ericsson in preparing his plans and drawings for contractors, and, at his own request, was authorized to establish an office and employ assistants in New York City, where he could have facilities and easy consultation with Mr. Ericsson.

IV. On the 10th of June, 1863, Donald McKay entered into the contract set forth in the petition, and the same day he received the specifications set forth below, but no drawings were received until the 24th of June. These specifications were identical with those issued in the Squando, which differed from the ones on which the bids were made in that they embodied additional and more expensive work.

On the execution of the agreement, the contractor set to work to prepare his sheds in which to build the hull, and to make such other preparations for carrying out the agreement as his information permitted.

"SPECIFICATIONS OF THE LIGHT-DRAFT MONITOR NAUSET.

"*General description.*

"The vessel will be of iron and wood, as follows:

"*General form.*—There will be an iron vessel, oval in form, with flat bottom, having one inch dead rise and vertical sides; the bilge of this iron vessel will be formed by a curve of 15-inch radius.

"Surrounding this iron vessel is what may be termed a raft of wood, having three inches less depth than the iron vessel and fitting it closely. The outer form of the raft, or wooden portion of this vessel, will
6 be of the usual character of an ordinary vessel, extending forward of the iron one 13 feet; abaft it 20 feet 9 inches, and upon each side 4 feet, with three inches thickness of iron armor plating in three thicknesses of one inch each, by three feet wide in the vertical direction, to be let in flush with the sides of the wooden vessel.

"*Deck.*—The deck will be composed of oak beams 15 inches deep in the center, placed side by side, with their joints thoroughly caulked and pitched, forming a solid roof over the iron hull.

"The deck plating will run longitudinally, arranged with a view to strength in that direction. These plates will extend over the side raft, to which they are secured by bolts extending down to the bottom of the woodwork.

"*Iron hull.*—The sides and bottom of the iron hull will be stiffened by angle-iron frames placed at intervals of 18 inches. Transverse strength will be given by two rows of stanchions and diagonal braces placed 3 feet apart, the top ends of the two rows of stanchions to be connected by straps of iron fitting close to the underside of deck beams. Over the boilers the straps will extend to the side of the iron hull and be secured thereto by $3\frac{1}{2}$ x $3\frac{1}{2}$ x $\frac{1}{2}$ inch angle iron. Knees stiffened by plate-iron gusset pieces $\frac{3}{8}$ inch thick. The bottom of the iron hull will be plated in the ordinary way, but the sides may have all joints lapped with rivets projecting on both sides.

"The wooden hull to be covered with coal tar and patent felt, and over this sheet iron, painted with two coats of white zinc inside and three coats of same paint outside, sheet iron two pounds to the square foot.

"*Keelsons.*—There will be two keelsons running the whole length of the iron hull, formed of $\frac{3}{8}$-inch plate iron, 12 inches high, topped by two bars of $2\frac{1}{2}$ x $2\frac{1}{2}$ x $\frac{5}{16}$ inch angle iron. Between the turret bulkhead and the boilers these keelsons will run together, so as to form a box keelson

12 inches wide, which will continue in that form to the stern of the vessel; forward of the turret bulkhead they will be one-third of the breadth of the vessel, from center to center; a cross floor 12 inches deep (same height as center, fore, and aft keelson), $\frac{5}{16}$ inch thick to every fourth frame, and topped with one bar of $2\frac{1}{2}$ x $2\frac{1}{2}$ x $\frac{5}{14}$ inch angle iron on the opposite side to frame, straight out to bilge, so as to strengthen the botton between diagonal braces.

"Under the boilers a reverse bar of angle iron $3\frac{1}{2}$ x $3\frac{1}{2}$ x $\frac{7}{16}$ will be attached to every second frame, running it up to deck beams on the side and raising it up to the same height as center keelson in the center, thus forming a good seat for the boilers.

"*Water compartments.*—There will be extending all around the iron hull a water-tight compartment 2 feet wide, except at the stern, where it will be diminished to 21 inches. The bottom of this will be formed by plate iron lapping on the bilge strake, to which it will be securely riveted; the sides and bottom will be stiffened by $3\frac{1}{2}$ x $3\frac{1}{2}$ x $\frac{7}{16}$ inch angle-iron frames, spaced 3 feet apart. The bottom for the space of 90 feet amidships will be $\frac{1}{2}$ inch thick; at the ends it will be $\frac{3}{8}$ inch thick. The sides will be formed of $\frac{5}{16}$-inch iron, which may be lapped. The bottom must be butted and strapped; the sides will be topped by a bar of 6 x $3\frac{1}{2}$ x $\frac{1}{2}$ inch angle iron, to which the beams will be bolted. This space or compartment will be divided into subcompartments by bulkheads, communication being had to each compartment by means of wrought-iron pipe placed inside the compartment and communicating with the inside of the vessel abaft the boilers.

"Suitable cocks or valves will be placed connecting with this pipe, so as to allow a separate communication with each compartment.

"*Pumps.*—These compartments will be emptied by means of two powerful steam pumps, one to be placed upon each side of the vessel between the boilers and the engines.

"These pumps must be equal in capacity and efficiency to Andrews' No. 9 centrifugal pumps, to be driven 300 revolutions and deliver 3,000 gallons per minute. A sea valve for the purpose of filling the compartments will be placed near the pumps.

"*Construction of raft.*—The external woodwork will be firmly attached to the iron hull by a series of eyebolts secured to the angle-iron frames on the outside of the hull, without through bolts. To facilitate this construction the holes through the wooden timbers will be larger than the bolts, so that they will pass through loosely, the whole being screwed firm by nuts bearing against large square washers cut from plate iron $\frac{1}{4}$ of an inch thick.

"*Armor stringers at bow.*—Underneath the armor plating, for a distance of 25 feet from the bow, there will be inserted, upon each side, two armor stringers, 9 by 7 inches in section.

"*Turret.*—There will be one turret 8 inches thick, 20 feet internal diameter, and 9 feet high, with a band of forged iron 5 inches thick by 15 inches wide, forged in four pieces, riveted to the lower part upon the outside as per drawing. This band must be forged from the best charcoal scrap iron, that it may not break when struck by heavy shot. A pilot house will be placed on the top, 10 inches thick, 6 feet internal diameter

by 6 feet 6 inches high. The turret to be arranged to carry two guns of 16,000 lbs. weight each, and to be revolved by steam machinery similar to those now building. This similarity will extend to the blowers and blower engines, and to the arrangements for ventilating the vessel. There will also be a rifle-proof screen, of suitable height, of half-inch iron, around the top of the turret, for "sharpshooters." All plates, both of pilot house and turret, to be heated when bent.

"*Rudder.*—The rudder will be equipoise, and will be worked from the pilot house on the top of the turret and from top of turret, as in the monitor fleet, now building.

"*Plating of hull.*

	Under engines.
Thickness of keel plates	$\frac{1}{2}$ inch to $\frac{9}{16}$ inch.
Breadth " " "	24 inches.

	90 feet in length amidships.	Ends.
Thickness of garboard strake	$\frac{1}{2}$ inch.	$\frac{7}{16}$ inch.
Thickness of bilge strake	$\frac{1}{2}$ inch.	$\frac{9}{16}$ inch.
Other parts of bottom thickness	$\frac{7}{16}$ inch.	$\frac{1}{2}$ inch.
Thickness of sides	$\frac{9}{16}$ inch.	

"*Riveting.*—Bottom to be butt jointed and strapped with straps equal to the thickness of the sheets joined; straps to be 8 inches wide and double riveted; garboard strake to be double riveted to the keel with a lap of $3\frac{3}{4}$ inches, to be measured after seams are caulked. Nine-sixteenth-inch plates to be riveted together, and to thinner plates by $\frac{7}{8}$-inch rivets, spaced $2\frac{1}{2}$ inches apart between centres. Half-inch plates by $1\frac{3}{16}$-inch rivets, spaced $2\frac{1}{4}$ inches apart. Seven-sixteenth-inch plates by $\frac{3}{4}$-inch rivets, spaced $2\frac{1}{8}$ inches apart. Five-sixteenth-inch plates by $\frac{5}{8}$-inch rivets, spaced 2 inches apart. Between floor frames and outside sheets there are to be fitted sliver pieces of equal breadth with the frames, and the full length of the space. Bar rivets through frames and all angle irons about the hull to be spaced every 6 inches and be driven so as to draw frame, sliver piece, and plate tightly together.

"*Bulkheads.*—There will be three athwartship bulkheads of iron—two under the turret of $\frac{1}{2}$ inch thick and one dividing coal bunker from boilers $\frac{3}{8}$ inch thick. Between the two turret bulkheads will be two fore and aft bulkheads of $\frac{1}{2}$-inch iron, and the passage through the coal bunker will be formed by two bulkheads of $\frac{3}{8}$-inch iron.

"Turret bulkheads to be braced x angle irons $3\frac{1}{2}$ x 6 x $\frac{1}{2}$ inches. All other bulkheads by angle irons $3\frac{1}{2}$ x $3\frac{1}{2}$ x $\frac{1}{2}$ inches, spaced 24 inches apart.

"*Storerooms and quarters.*—The part forward of the turret chamber will be devoted to quarters for the officers and men, storerooms, magazine, shell room, and ground tackle gear, suitably arranged and divided by first-class joiner work, mainly of white pine, with black walnut furniture in cabin and wardroom. Berths, neatly upholstered and arranged to close up, as per detailed drawings, to be furnished.

"*Motive machinery.*—The motive machinery will consist of two horizontal tubular boilers, two direct acting inclined engines, two screw propellers, and one surface condenser, with independent air, circulating feed, and bilge pumps.

"*Boilers.*—The boilers will be placed one upon each side of the vessel, with one fire room in common, running fore and aft between them. There will be four furnaces in each, two of them at the forward and two at the after ends, with the tubes, through which the products of combustion will return, between them. The coal will occupy the entire vessel between these boilers and the turret chamber, with the exception of a passage 2 feet 6 inches wide amidships, through the upper part of which the wind will be carried to the fire room from the fan blowers.

"*Engines.*—The engines will be attached to four transverse iron keelsons, and will be just sufficiently inclined to permit the cross head of one to work under the shaft of the other, the starboard propeller being worked by the port cylinder. These engines will work entirely independent of each other, thus permitting the one engine to work backward while the other goes ahead when desired, facilitating the rapid evolution of the vessel.

"*Auxiliary steam pumps.*—There will be two auxiliary steam pumps equal in character and capacity to Worthington's No. 5.

"PRINCIPAL DIMENSIONS.

"*Dimensions of hull.*

Length of vessel over all	225 feet.
Length of iron hull	183 feet.
Extreme beam over armor	45 feet.
Beam of iron hull	33 feet.
Total depth of vessels amidships	9 feet 1 inch.
8 Depth of iron hull	7 feet.
Diameter of deck stanchions	2½ inches.
Diameter of diagonal braces	2 inches.
Floor and side frames of angle iron	4 x 3 x $\frac{7}{16}$ inches.
Angle iron all around the top of iron hull	6 x 3½ x ½ inches.
Eyebolts attached to each outside angle-iron frame for securing inside course of timber raft to the iron hull	*1¼ inches.
Blunt bolts for securing the timbers of the raft to each other	*1¼ inches.
Bolts for securing deck beams to raft	*1¼ inches.
Mean length of ditto	8 feet.
Thickness of oak planking covering pine raft	2½ inches.
Thickness of each sheet of iron on deck	½ inch.
Making one inch of iron and 15 of oak.	

Dimensions of boilers.

Breadth of boilers athwartships	9 feet.
Length, fore and aft	25 feet 7 inches.
Height	6 feet 8 inches.
Length of tubes	7 feet 6 inches.
Outside diameter of tubes:	
Upper row	1⅝ inches.
Next row	1⅞ inches.
" "	1¾ inches.
" "	2 inches.
" "	2⅛ inches.
" "	2¼ inches.
" "	2⅜ inches.
" "	2½ inches.
" "	2⅝ inches.
" "	2¾ inches.
" "	3 inches.
" "	3⅛ inches.

* Diameter.

"Tubes of each boiler to be disposed in two congeries, each congerie to have fifteen tubes in breadth and twelve tubes in height, as above.

Thickness of—

Sides and top of shells	$\frac{5}{16}$ inch.
Furnaces and boiler bottoms	$\frac{9}{8}$ inch.
Ash pans	$\frac{7}{16}$ inch.
Tube sheets	$\frac{1}{2}$ inch.
All other parts	$\frac{5}{16}$ inch.

"All flat surfaces to be stayed every eight inches with stays one inch in diameter. Wherever flat stays are necessary the section must be equal to one square inch for every point of surface stayed. T-iron of $3\frac{1}{2}$ x 4 x $\frac{3}{8}$ inches to be riveted to top and sides of shell every 4 inches (8 inches apart on each side), as shown in the drawing. All parts, except those exposed directly to the fire, to be double-riveted. The seams of the furnaces to run longitudinally, and to be exactly as shown in the drawing.

Dimensions of engines.

	Inches.
Diameter of cylinders	22
Length of stroke	30
Diameter of piston rods	3
Diameter of connecting rods at neck	3
Diameter of crank pins	6
Length of crank pins	5
Diameter of main journals	7
Length of main journals	$10\frac{1}{2}$
Diameter of screw shaft	7

Condenser.

Surface of tubes in condenser	2,500 square feet.
Outside diameter of tubes	$\frac{5}{8}$ inch.
Thickness of tubes	No. 18 wire gauge.
Length of tubes	8 feet.

9 *Propellers.*

Diameter of propellers	9 feet.
Pitch of propellers	12 feet.
Number of blades	4

Smoke pipe.

Impregnable smoke pipe, height	2 feet 3 inches.
Internal diameter of smoke pipe	5 feet 0 inches.
Thickness of smoke pipe	0 feet 8 inches.

Made of eight plates one inch thick each.

"*Spare machinery, tools, and equipments.*—Spare machinery and tools for the machinery, and equipments for all departments of the ship, except guns, coal, and ordnance equipments to fit the vessel for service, to be furnished by the contractor. These will be similar in character and extent to the new monitor vessels recently put afloat.

"It is understood that mere omissions of this specification, or of the drawings now exhibited, to enumerate all the parts required to make a complete vessel, fully equipped and ready for active service, shall not be considered a cause for any addition to the contract price."

V. Ericsson not having time to make all the calculations and detailed working plans, that work was confided to Chief Engineer Alban C. Stimers, of the U. S. Navy. Stimers had been engaged with Mr. Ericsson in the construction of the first monitor; had gone in that vessel, in the

capacity of engineer, from New York to Hampton Roads; had there assisted in the contest between the "Monitor" and "Merrimac," and since that time had been engaged more or less, by order of the Navy Department, in superintending the construction of the other monitors contracted for by the Department.

He witnessed the assault made upon Fort Sumter by seven monitors in the spring of 1863, and on his return to Washington had a consultation at the Navy Department.

The question discussed by the officers was whether it would be better to build the vessels in strict accordance with the letter of the contracts, which were being given out without any change whatever, or to take advantage of experience from time to time and make improvements as they went along, although such course would delay the completion and add to the cost of the vessels. It was determined to make changes as experience suggested.

At the time of making bids in response to the call therefor, copied in Finding II, certain general plans and specifications had been prepared and were in the office of Chief Engineer Stimers, in the city of New York, open to inspection by the bidders. Donald McKay was not furnished with the general plan identical with said plans, specifications, and drawings, but at the time of making the contract was furnished with the general plans and details set forth in Finding IV, which embodied changes from and additions to those existing at the time of the bid. Changes and additional work were ordered from time to time during the construction of the vessel or required by the other general plans dated October 25, 1864, and by the altered specifications of August 7, 1863, and those of October 27, 1863.

VI. The Department commenced forwarding to the contractors orders for and drawings of changes before the keel was laid, and those changes, which in the aggregate affected all parts of the vessel, and made in the end different vessels, were continued, and the drawings therefor furnished for nearly a year after the time specified in the contract for their completion had elapsed, and from the 25th of June, 1864, for about the period of three months work was suspended by the orders of the Navy Department, which had then in contemplation some general changes in its construction which required time to perfect. During this time the contractors were under expenses; they dared not discharge their men for fear of inability to supply their places.

VII. But for the delay of the Government in furnishing plans and specifications, the Nauset would have been substantially completed within the time specified in the contract; the contractors had the means and the ability to do so. The losses sustained by reason of the delays of the Government could not have been prevented by any reasonable prudence or foresight on their part. The labor could not be anticipated, nor could they know from the changes being made the kind, quantity, and quality of the material necessary to be used in complying with the changes.

VIII. In May, 1864, the first of these vessels, the Chimo, was launched at Boston. She was found to be defective. All these vessels having been designed upon the same plan, further work was at once suspended upon them. A commission was appointed June, 1864, to examine them, and to recommend what should be done with them to remedy their defects.

The commission reported on the 9th of July, 1864, recommending that five of the vessels should be changed into torpedo boats in order to lighten their draft, and that the other fifteen should be changed by building up their sides 22 inches, increasing their draft, but rendering them more serviceable as monitors. That recommendation was adopted by the Department, and the proposed changes were carried out.

The allowance for the change of 22 inches is shown in Finding IX.

IX. When it was found that these vessels were failures as originally designed and constructed, they were placed in charge of other officers and altered as recommended by the commission appointed to examine them.

The vessel was completed July 15, 1865. The time necessarily employed in its construction was twenty-five months.

For four alterations the compensation was fixed in advance by the contractors and the Government, as provided in the contract, to wit:

For bulkheads authorized September 29, 1863	$1,547.52
Alteration in pilot-house cover, September 21, 1863	1,000.00
Alteration of port stoppers, October 2, 1863	300.00
	2,847.52
Raising the vessel 22 inches	86,000.00

About three months of the prolonged period of seventeen months was necessarily occupied in the performance of the alterations described in this finding.

11 X. The contract price was paid the contractor in full.

The amount received for the changes and alterations by the contractors over and above the contract price was $192,110.98.

The value and cost of the changes, additions, and alterations made by defendants to said vessel not embraced in the original agreement and not embraced in the special allowance to said contractors, and not paid for in the payments heretofore made to contractors, is the sum of $24,232.56.

These alterations, when made, complied with the specifications of the same as furnished by the Government.

The cost to the contractor because of the enhanced price of labor and material which occurred during the prolonged term for completing the work is $61,571.67. Said prolonged term resulted from the delays of the defendants. The exercise of ordinary prudence and diligence on the part of the contractor would not have avoided said enhanced price of material and labor.

The cost of clerk hire and watchman and draftsmen employed by said contractor during the time prolonged by said defendants as aforesaid was the sum of $14,763; the cost of superintendent and foremen employed by said contractor during the time prolonged by said defendants as aforesaid was the sum of $16,688, both amounting to $31,451. While the Nauset was under construction work upon another vessel was proceeding in the same yard by the same contractor, and it does not appear what part of the time of superintendent, clerks, draftsmen, foremen, and watchmen was given to each of the two vessels, but dividing the amount equally between the two vessels gives $15,725.50. Said amounts do not include the cost of additions and alterations already paid for and set forth in Finding IX.

The foregoing allowances do not include compensation for rent of yard, shops, or plant during the prolonged period, nor for insurance or contractor's time during said period, though each was of substantial value and the plant would have commanded a fair rental.

XI. At the time for making the contract for the construction of the said vessel or battery the contractor was informed that the working drawings were not yet elaborated in detail either for the vessel or its machinery.

XII. When the contract was made the contractor had not his yard fully prepared and no shipbuilders in his employ, and during the twenty-two days between the signing of the contract and the receipt of the first working drawings the contractor was engaged in getting some portions of his yard in order.

During the construction of these vessels Donald McKay's facilities were as follows:

The main machine shop was 320 by 56 feet; 120 of it was two stories high; the upper story was the pattern shop. There were winged buildings annexed—one large one, which was the machinery blacksmith
12 shop, another one called the turret shop, and the boiler shop. There was another blacksmith shop for the woodwork; that building was about 120 by 30. There was another one called the mold-loft building; that was about 140 by 30 to 35 feet wide. There was a small sawmill on the premises. Then there were storehouses. The ground itself, excluding the improvements, was worth $50,000. In these shops five hundred men could be employed comfortably.

XIII. Donald McKay died in the county of Essex, Mass., and letters testamentary have been duly issued to claimants.

For the last payment made by defendants contractor signed the following receipt:

NEW YORK, *July 26th, 1865.*

U. S. Navy Department to Donald McKay, Dr.

On account of work done to the light-draft monitor "Nauset," which is extra to the contract dated June 10th, 1863, being the full and final payment on all extras and in full for all claims and demands for that work	$29,863.46

CR.

By machinery and material received from Casco for use in the construction of the "Nauset"	12,950.91
Balance due	16,912.55

I certify that the materials and labor which are extra to the contract dated June 10th, 1863, put upon the vessel "Nauset," built by Donald McKay, amount in value to $102,710$\frac{55}{100}$ (certificates having been previously given for $72,847$\frac{55}{100}$), and that they are according to directions which have been given him from time to time.

ROBERT DANBY,
General Inspector of Steam Machinery for the Navy.

Approved:
F. H. GREGORY,
Rear-Admiral, Superintending.

$16,912.55.] NAVY DEPARTMENT, BUREAU OF CONSTRUCTION, &C.,
July 31, 1865.

Approved in triplicate for sixteen thousand nine hundred and twelve dollars and fifty-five cents, payable by the Navy agent at Boston.

A. N. SMITH,
For Ch'f of Bureau.

BOSTON, *Aug. 25th, 1865.*

Received of Robt. H. Clark, paymaster, sixteen thousand nine hundred and twelve dollars and fifty-five cents, in full for the within bill.

DONALD MCKAY,
Pr. Atty. Geo. B. Upton.

McKay objected to the final balance as not sufficient at the time he gave the receipt.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant, Edward P. Bliss, executor of the estate
13 of Donald McKay, deceased, recover of and from the United States the sum of one hundred and one thousand five hundred and twenty-nine dollars and seventy-three cents ($101,529.73), made up of the following items:

Additional cost of extras and charges over the sums already received	$24,232.56
Enhanced cost of labor and material necessary to perform the original contract	61,571.67
Clerk hire, superintendent, foreman, and watchman during the prolonged period	15,725.50
Total	101,529.73

14 XI.

The court filed no opinion to accompany either the original or the judgment as remitted.

The judgment for $101,529.73 was not appealed from by either party.

XII.

The $61,571.67 set forth in the tenth of the final findings in the "Nauset" case (see X finding above) was composed of $24,634 enhanced cost after February 10, 1864, the expiration of the contract term for the construction of the "Nauset," and the remainder, $36,937.67, was enhanced cost of labor and material furnished by Donald McKay within the contract term (June 10, 1863, to February 10, 1864), but the court did not separate the allowance in its findings.

LOUIS A. PRADT,
Assistant Attorney-General.
JOHN S. BLAIR,
Atty. for Appellee.

WASHINGTON, D. C., *Nov. 21, 1898.*

15 (Indorsed:) File No., 16979. Supreme Court U. S. October term, 1898. Term No., 394. The United States, appt., vs. Edward P. Bliss, executor of Donald McKay, dec'd. Stipulation and addition to record. Filed Nov. 21, 1898.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

THE UNITED STATES, APPELLANT,
v.
EDWARD P. ELLIS, EXECUTOR OF DONALD McKAY, *deceased*.
No. 284.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

CHARLES C. BURLEY,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
EDWARD P. BLISS, EXECUTOR OF DONALD McKAY, deceased. } No. 394.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On August 22, 1863, the appellee's testator, Donald McKay, contracted to build an iron double-ender paddle-wheel gunboat, afterwards called the *Ashuelot*, for the Navy Department, the vessel, with its machinery, appurtenances, equipment, and outfit, to be completed in eleven months from the date of the contract. The contractor built the vessel as agreed, and was paid the full contract price for the work (Rec. 13, 14). Changes and additional work were ordered from time to time during the construction of the vessel, for which he was paid $25,407.54.

On account of these changes and additional work, and also on account of other delays for which the Navy Department was responsible, the completion of the vessel was delayed from July 22, 1864, the date fixed by the contract, to November 29, 1865 (Rec. 14). During the period of eleven months within which the vessel was to have been completed according to the contract there was a considerable advance in the prices of labor and material, so that the cost of the vessel to the contractor was materially increased over what it would have been had there been no delay. This advance in prices reached its maximum on or before July 22, 1864, when the contract period of eleven months expired, and no further advance occurred between that date and the date of final completion of the vessel (Rec. 14, 15).

The private act of August 30, 1890 (26 Stats., 1247; Rec. 11), authorized the appellee to file a claim in the Court of Claims for further compensation for the construction of the side-wheel steamer *Ashuelot*, and gave the said court full jurisdiction to hear and determine and render judgment upon such claim. The liability of the United States was, however, limited in the said act by certain provisos, among which are the following:

> *Provided, however,* That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draft monitors *Squando* and *Nauset* and the side-wheel steamer *Ashuelot* in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: *Provided,* That such additional cost in completing the same,

and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work, were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid.

After hearing the case, the Court of Claims, on April 18, 1898, found that the cost of changes and extra work over and above what had been paid therefor was $4,153.05; the additional cost for superintendence, clerks, etc., occasioned by the delay, $5,480.06; the additional cost for insurance occasioned by the delay, $1,917.97; the increased cost of labor, $12,608.71; and the increased cost of material, $14,815.66. Judgment was accordingly entered for all of the above items, making a total of $38,975.45, whereupon the United States took this appeal. (Rec., 15.)

ASSIGNMENTS OF ERROR.

The court below erred:

1. In holding the appellant liable, under the private jurisdictional act, for the whole cost of the labor employed and material purchased by the contractor after the expiration of the contract term over what such labor and material would have cost had the vessel been completed within that term, although no further advance in the price of labor and material occurred after the expiration of the contract term.

2. In entering judgment, in favor of the appellee, for $38,975.45 instead of $11,551.08.

BRIEF OF ARGUMENT.

This appeal is not directed to all the items which make up the amount of the judgment rendered against the appellant. The jurisdictional act warrants an allowance for the cost of changes and extra work, the increased cost to the contractor for the pay of superintendence, clerks, etc., after the time when the vessel should have been completed, and the increased cost due to the outlay for insurance after that period. The features of that part of the judgment to which this appeal relates consist of the allowances for the increased cost of labor and material. The only question at issue, therefore, is the meaning of a portion of the jurisdictional act, reading as follows:

> *Provided, however,* that the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building * * * the sidewheel steamer *Ashuelot* in the completion of the same, by reason of any * * * delays in the prosecution of the work: *Provided,* That such additional cost in completing the same, * * * and delays in the prosecution of the work, were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid.

The language of the jurisdictional act in regard to claims for advance in the price of labor and material is definite and positive. It provides expressly that "no

allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid." In the present case the vessel was to have been completed, according to the contract, by July 22, 1864, but was not actually completed until November 29, 1865. The "prolonged term for completing the work rendered necessary by delay resulting from the action of the Government" was therefore the period of sixteen months and seven days from July 22, 1864, to November 29, 1865, and the jurisdictional act forbids any allowance for any advance in the price of labor or material unless such advance occurred during that period. The court below has found explicitly that the advance in price of labor and material occurred during the contract period of eleven months, that is, before July 22, 1864, and that after that date there was no further advance, the increased price continuing "without material change until the completion of the vessel, sixteen months and seven days subsequent to the expiration of the contract period." (Rec. 15.) It is therefore submitted that the allowances of $12,608.71 for increased cost of labor and $14,815.66 for increased cost of material were not warranted by the jurisdictional act.

This precise point was decided by the Court of Claims in the very similar case of *Lawrence* v. *United States* (32 C. Cls. R., 245). In that case the original contract was made June 2, 1863, and the vessel was to be completed February 2, 1864. Subsequently this contract was annulled and another one for the construction of the same

vessel was entered into between the same parties on November 3, 1863, the vessel to be completed by July 3, 1864. Owing to delays for which the Navy Department was responsible, the vessel was not completed until October 4, 1865. Suit having been brought under a private jurisdictional act, the language of which was precisely similar to that of the jurisdictional act in the present case, the Court of Claims held that recovery could only be had under the second contract—that of November 3, 1863. It found, however, that there had been a great advance in the price of the labor and material entering into the vessel between February 2, 1864, the date when the vessel should have been completed under the first contract, and October 4, 1865, the date of actual completion, but that none of that advance in price occurred after July 3, 1864, when the vessel should have been completed under the second contract. The contractor, even under the second contract, had incurred great expense in the contract work on account of the advance in the price of labor and material before July 3, 1864, but the court held that he was not entitled, under the jurisdictional act, to recover for such increased cost of labor and material, because there had been no advance in prices after the expiration of the contract term. Nott, C. J., said:

> The theory upon which the previous cases [certain other cases previously decided under similar special acts] were decided was this: The court regarded the contract as giving to the builder a period of eight months within which he was bound to construct and complete the vessel, and to the Government, reciprocally, the same period of eight months

within which it was not responsible under the statute "for any advance in the price of labor or material." The "prolonged term for completing the work," in the opinion of the court, began when the eight months expired. * * * The second contract bore date November 3, 1863; consequently the period of eight months expired on the 3d day of July, 1864. If that was the date on which the liability of the Government began, the claimant should recover nothing for increased cost of labor or increased cost of material. * * * The statute contemplates a term within which the builder had to run the risks of increased cost of a rising market, and it designates another term of changes, alterations, and delays during which the Government would be responsible for the enhanced market price of labor and material. Manifestly, the one term must end before the other term could begin.

The questions therefore remain: During what period did the Department hinder and delay the work? During what period was there a rise in the prices of labor and material? * * * The court must hold that the term for completing the work for which the Government is responsible began at the expiration of the term of the second contract, to wit, on the 4th of July, 1864.

The doctrine above stated applies exactly to the present case. Here the Government had a period of eleven months, from August 22, 1863, to July 22, 1864, "within which it was not responsible, under the statute, 'for any advance in the price of labor or material.'" The "prolonged term for completing the work began when those eleven months expired, i. e., on July 22, 1864, and thereafter no 'advance in the price of labor or material'" occurred.

It is therefore manifest that the decision of the court below in the present case, wherein no opinion has been filed, involves a positive overruling of the decision of the same court made in the Lawrence Case and explained in the opinion in that case.

It is to be observed that in the Lawrence Case the court's decision as to the Government's liability for the advance in the price of labor and material, occurring during the prolonged term only, has nothing whatever to do with its decision as to which contract could be sued on, except only ~~the~~ matter of amount. The findings are silent as to any advance in price during the period within which the vessel was to have been completed under the first contract, but ~~say~~ that "between the 2d of February, 1864, when it was originally contemplated, under the contract of June 2, 1863, that the vessel should be completed, and October 4, 1865, the date of her completion, there was a great advance in the price of labor and material entering into the vessel;" and further that "if the claimant is legally entitled to recover for the prolonged term beginning at the expiration of the period of eight months from the date of the contract of June 2, 1863, to wit, on the 3d day of February, 1864, the following is the additional cost incurred." (32 C. Cls. R., 253.) Whether the figures actually given by the court as the increased cost of labor and materials be correct or not can not now be inquired into, but it is indisputable that the court must have understood those figures as giving the amount of the advance in price occurring after February 2, 1864, as the findings are absolutely silent as to any advance before that date. Had the decision

upheld the first contract, then the amount recovered for the advance in price would, upon these findings, have been for an advance over the prices current on February 2, 1864, the day before the prolonged term began.

It is perfectly true that a provision for payment for the advance in the price of labor and material occurring "during the prolonged term for completing the work," i. e., an advance over the prices current on the day when the vessel should have been completed, does not give full compensation for the extra cost due to delay caused by the Government, and that in the present case such a provision cuts out $27,424.37; and it is equally true that Congress might have omitted any restriction as to the period during which the advance for which the claimant was to recover must have occurred. For this reason it was contended in the court below (and successfully, as the judgment shows) that Congress must be understood to have provided for full compensation to the claimant for *all* his losses in building the vessels, provided those losses were due to the action of the Government, and therefore that the act must be construed to warrant a judgment for advances in the price of labor and material occurring "during and within the period of the contract," or, in other words, that the expression "the prolonged term for completing the work" is equivalent to "the period which was required for completing the work, which period was prolonged," an expression which would entitle the claimant for all advance in the price of labor and material over what the price would have been had the vessel been completed within the contract term.

The most obvious objection to this contention is that it makes the proviso absolutely meaningless and superfluous. The words of the statute, "the additional cost which was necessarily incurred by the contractors for building * * * the side-wheel steamer *Ashuelot*, in the completion of the same, by reason of any * * * delays in the prosecution of the work * * * occasioned by the Government of the United States," can not possibly be understood to cover any additional cost due to any rise in the price of labor and material *not* occurring during the period when the vessel was under construction—the period beginning with the execution of the contract—nor as failing to cover any such additional cost for any portion of the vessel over what that portion would have cost had there been no delay. These words insure full compensation for all additional cost necessarily incurred on account of delay, and they cover no more than this. So that if Congress wished to grant full compensation on that account these words of the statute sufficed.

It is a fundamental rule of statutory construction that effect must be given, if possible, to every word and clause, so that nothing shall be left devoid of meaning or destitute of force. (Black on Interp. of Laws, 166; Cooley's Const. Lims., 72.) This rule is too familiar, as well as too obvious, to call for argument in its support; and yet the decision of the court below can not be reconciled with this rule. That decision necessarily involves giving to the words "but no allowance for any advance in the price of labor or material shall be considered unless such ad-

vance occurred during the prolonged term for completing the work rendered necessary by delay" the same effect as if they had been "but no advance in the price of labor or material shall be considered unless such advance occurred during the period when the vessel was under construction," a phrase which in no way differs in effect from that already found in the statute, viz, "the court shall ascertain the additional cost which was necessarily incurred by the contractors, by reason of any delays." It is submitted that no construction of the clause in regard to the allowance for the advance in the price of labor and material, which makes it a mere repetition, in slightly different words, of what the statute has already said, can possibly be sustained.

Another objection to the appellee's contention is that the language of the proviso does not admit of such a construction. The clause which relates particularly to the advance in the price of labor and material begins with the word "but," which indicates that the clause is intended to introduce something different from what has preceded it—to modify in some particular the effect of the preceding clause. Then the word "term" is used, which means a particular, definite period of time, "a space or period of time to which limits have been set" (Century Dict.), and the words "prolonged term" must refer to a period distinct from what may properly be called the "original term," or "contract term," i. e., the period referred to in the contract for the vessel itself as "eleven months from the date of this contract" (Rec. 4) and also as "the time stipulated" (Rec. 5). The words

"prolonged term for completing the work," too, indicate that this "prolonged term" was necessary in order to complete a work which had already been begun.

The only reason that can be suggested for giving to the words "during the prolonged term for completing the work" a construction which renders ineffective and superfluous the clause in which they stand is that Congress must be presumed to have intended to give full compensation to the parties to whom this act applied; but it is submitted that Congress was granting to these parties something to which their contracts did not entitle them, and that it may well have seen fit to limit its bounty. As whatever these parties acquired under this statute was by the bounty of Congress, the mere fact that such bounty stopped short of full compensation for their losses involved no absurdity or injustice. There is, therefore, no reason for departing from that primary rule of statutory construction that where there is no uncertainty or ambiguity the letter of the statute must govern.

In *Sturges* v. *Crowninshield* (4 Wheat., 122, 202) it was contended that the constitutional prohibition of State laws impairing the obligation of contracts could not have been intended to apply to such insolvent laws as had been passed by the colonial and State legislatures from the earliest times, although such laws produced the forbidden result. Marshall, C. J., however, said:

> Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for

> which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. This is certainly not such a case.

Further citation of authority in support of this familiar doctrine would be clearly superfluous, especially as this court has but recently declared itself upon the point in the following words:

> It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. (*United States* v. *Goldenberg*, 168 U. S., 98, 103.)

In the present case there is no convincing reason to suppose that the letter of the statute did not "fully and accurately disclose the intent" of Congress, but only a theory on the part of the appellee that greater liberality was intended than the letter of the statute would permit. Moreover, the act now under consideration was a private

one, granting to two parties, or their representatives, special rights of suit against the United States, and waiving the legal defenses which the United States had made in another suit, brought by another party on a precisely similar contract (see *McCord* v. *United States*, 9 C. Cls. R., 155), as well as the defense of the statute of limitations. Such an act, being a special grant of privileges, should be construed strictly against the grantees. *Hannibal and St. Joseph R. R. Co.* v. *Missouri River Packet Co.* (125 U. S., 260); *Coosaw Mining Co.* v. *South Carolina* (144 id., 550).

It is therefore submitted that the judgment of the court below should be reversed, with instructions to enter a judgment for the sum of $11,551.08 only, being the amount found due for changes and extra work, superintendence, clerks, etc., and insurance.

CHARLES C. BINNEY,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

No. 394.

Reply Brief of U.S.

v. Pratt

Filed Dec 9, 1896

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
EDWARD P. ELLIS, EXECUTOR OF Donald McKay, deceased. } No. 394.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

CHARLES C. BURNEY,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
EDWARD P. BLISS, EXECUTOR OF Donald McKay, deceased. } No. 394.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

The brief for appellee brings forward in support of the judgment of the court below certain contentions which have not been considered in the brief previously filed for the United States, and which seem to call for a reply.

1. *History of the jurisdictional act.*

The greater part of the brief for appellee is taken up with a review of the various legislative and executive proceedings which led up to the passage of the private jurisdictional act under which the present suit was brought. The object of calling attention to these proceedings is to show that the proviso in the jurisdictional act limiting the scope of allowances for advances in the

price of labor or material did not originate with that act, but is first found in the act of March 2, 1867 (14 Stats., 424), and appellee's counsel now contends that the interpretation of this proviso of the jurisdictional act must be controlled by the report of the House Committee on Claims, made when the act of 1867 was before Congress.

It is submitted that even if the present suit had been brought under the act of 1867 itself this committee report could not be received in evidence of the meaning which the whole body of Congress attached to the words of the statute. It is a well-settled rule that reports or recommendations made to a legislative body by a committee in relation to a pending measure can not be accepted as pertinent evidence of the meaning which the legislature intended to attach to the statute. (*State* v. *Burk*, 88 Io., 661; *Bank of Penna.* v. *Comth.*, 19 Pa., 144; see also *Donegall* v. *Layard*, 8 H. L. Cas., 460; *Steele* v. *Midland Ry. Co.*, L. R., 1 Ch., 275.) The reason for the exclusion of these reports is obviously the same as that given by this court for the exclusion of the expressions of opinion announced by members of a legislative body in debate. As far as throwing any light on the meaning of a bill is concerned, the difference between speaking in its favor and writing in its favor is immaterial, and hence it is pertinent to say in the present case that those who did not write "may not have agreed with those who did; * * * the result being that the only proper way to construe a legislative act is from the language used in the act, and upon occasion by resort to the history of the times when it was passed." (*United States* v. *Freight Association*, 166 U. S., 290, 318.)

If a committee report can not be received as evidence of the meaning of the act in regard to which the report was submitted, *a fortiori* it can not be received as evidence in the interpretation of an act passed years afterwards, and merely borrowing some of the language of the earlier act. While it is true that this court has held that debates in Congress are "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves" (*United States* v. *Wong Kim Ark*, 169 U. S., 649, 699), yet obviously these opinions, to be of any value whatever as a guide, must have been intentionally given in exposition of the legal meaning of the words used in the statute, as was actually the case in the opinions quoted in that case. A mere statement that it is desirable to do a certain thing, or that a claim based on a certain ground is valid and furnishes a legal and just rule for relief, can not possibly be taken as a definite exposition of the meaning of the words of a statute granting relief. If there be a discrepancy between the language of the statute itself and that of the report, it is the former which must be presumed to be the more carefully worded of the two, and which should control the latter, and not the reverse.

2. *The plain language of the jurisdictional act.*

Appellee's counsel seems to admit what is stated in the brief for the United States, page 10, that his contention makes the proviso in regard to advances in the price of labor and material absolutely meaningless and superfluous. He says:

> The basis for the investigation of the claim was limited to the additional cost necessarily incurred

> by reason of the changes ordered and delays caused by the United States. This excluded all enhancement in cost by reason of advance in prices if not consequent upon the action of the Government, and the clause in controversy, being the only one which mentions advance in price, may have been inserted partly by abundance of caution to show that the advance in price was in the mind of the lawmaker and was part of the cost to be considered by the Marchand board and by the Court of Claims in the investigation. (Brief for appellee, p. 18.)

The theory that a particular clause was introduced into a statute out of abundance of caution can not warrant its being so interpreted as to neither add anything nor take away anything from what would have been provided for without it, when the language of the clause itself necessarily indicates that this insertion was intended to modify in some particular the effect of the general language which precedes it. The words "provided" and "but" clearly indicate that the draftsman of the act of 1867, in which these words were originally found, meant to limit the allowances for advances in price to advances occurring during a certain "prolonged term," he evidently considering that the general language which preceded this proviso did not so limit the allowances. Now, it being admitted even by appellee's counsel that the language of those provisions which preceded this proviso in the statute (viz, "further compensation for the construction of the side-wheel steamer *Ashuelot*," "the additional cost which was necessarily incurred by the contractor in building the side-wheel steamer *Ashuelot* in the completion of the same") itself applied to the

entire period during which the vessel was under construction, and to no other period, the "prolonged term" must mean something less than that entire period, or else this proviso is wholly superfluous and the draftsman of the statute did not know the meaning of the words he used.

Under the rule that effect must be given, if possible, to every portion of a statute, it is clear that this proviso must be given a meaning different from that of the clauses which precede it, unless such different meaning is positively forbidden by its language. It appears, however, that the language of the proviso not merely warrants, but requires, an interpretation which limits the allowances to advances in price occurring after the contract terms for building the vessels to which the jurisdictional act related. The words "the prolonged term for completing the work" can mean nothing less than a term added to some previous period of time for the purpose of completing a work already begun and carried on during such prior period of time. To warrant appellee's contention, the words should have been "the period when the vessel was in building," words which would obviously have had a different meaning from those actually used.

3. *The decision in the Lawrence case.*

Appellee's counsel contends that the interpretation of the jurisdictional act under which the case of *Lawrence* v. *United States* (32 C. Cls. R., 245) was brought, an act similar to that involved in the present case, was a mere dictum "because the very point now presented for discussion did not in that case require consideration." It

is submitted that this contention wholly overlooks what was decided in the Lawrence case. The court of claims there held, first, that the only contract which could be sued upon in that case was the second contract; and secondly, that the only liability of the United States for advance in the prices of labor and material was for such advances as occurred after the expiration of the term fixed in the contract for building the vessel. The latter point, which is the very point now presented for discussion, was just as vital to the judgment in the Lawrence case as its overruling was to the judgment in the present case. Precisely the same point arose in both cases, and the only difference between the cases was in the judgment of the court, which decided the point in one way in the Lawrence case and in the opposite way in the present case. The mere fact that if the court had decided this point differently in the Lawrence case an amendment of its findings would have been required, in order to show the amount for which judgment should be entered, does not make one of the fundamental bases of the actual judgment a mere dictum.

4. *Effect of the judgment in the Nauset case.*

Since the original brief for the United States was written appellee's counsel has by stipulation added to the record a statement covering the proceedings in another case under the same jurisdictional act and between the same parties, but in regard to another vessel. It must be admitted that in taking action on the motion for a new trial in that case the Court of Claims did not adopt the same construction of the jurisdictional act which it

subsequently adopted in the Lawrence case, and that its decision in the present case was a return to the position which it had taken in the first Bliss case. The contention that the court below was bound in the present case to adhere to its decision in the first Bliss case because it was a suit between the same parties is, however, wholly unwarranted. The doctrine of *Chaffin* v. *Taylor* (116 U. S., 567), cited by appellee's counsel, is that this court will not review a final decision made by it in any case, upon a second appeal in the same case upon the same state of facts. In *Chaffin* v. *Taylor*, as well as all the prior cases which led up to it, it is clear that this finality of the decisions of this court can only be invoked as regards a second appeal upon the same facts in the very case in which the decision has been rendered, not in another case, whether between the same parties or not.

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No. 394.

Brief of Blair for Appellee.

Filed Dec. 10, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 394.

THE UNITED STATES, APPELLANT,

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EDWARD P. BLISS, EXECUTOR OF DONALD McKAY, DECEASED.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

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LAW REPORTER PRINT.

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Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

This is an appeal by the United States from a judgment of the Court of Claims in favor of the appellee for $38,975.45. The Attorney General has no objection to $11,551.08, and assigns for error the allowance by the court below of $27,424.37 for additional cost of the gunboat *Ashuelot* to the contractor by reason of advance in prices during delays caused by the United States. The suit was brought under the provisions of an act of Congress for the relief of Nathaniel McKay and the executors of Donald McKay (26 St. 1247), set out in full at page 11 of this Record.

For the proper interpretation of this statute, "regard is to be had," as was said by Mr. Justice Gray in United States *vs.* Wong Kim Ark, 169 U. S. 649 and 653,—

> "not only to all parts of the act itself and of any former act of the same law-making power, of which

the act in question is an amendment; but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted."

See also Blake *vs.* National Bank, 23 Wall. 307.

I.

History of the Law.

The progress of the construction of iron-clad steam gunboats became a matter of public history June 29, 1864, when the Senate adopted the following resolution:

> "*Resolved*, That the Committee on the Conduct of of the War be instructed to inquire what progress has been made in the construction of the iron-clad steam gunboats contracted for in the year 1862, by whom the contract was made on the part of the Government, who planned the models of the same, and who is responsible therefor; have any of them been finished; if so, what was the condition of the vessel after she was launched; are the other vessels contracted for to be built on a plan or model similar to the *Chimo*, lately launched at Boston; and all information which may be had touching said gunboats.
>
> See Page I, Report on the conduct of the War, 2d Session, 38th Congress. Part 3, Senate Report 142, entitled Light Draft Monitors.

The Committee on the Conduct of the War took testimony and received communications until March 2, 1865, and reported one hundred and twenty pages of information on the subject. Senate Report 142, 38th Congress, 2d Session. It may be noted in passing that while the Senate Resolution asked for an investigation of the contracts of 1862, the Committee gave most of its attention to the contracts of 1863. The committee reported that the *Chimo*

was a failure; that some of the Government officers had blundered; that changes had been ordered for the whole *Chimo* class; that there had been a miscalculation in the displacement, and that additions and alterations were made after the contracts were entered into.

Seven days after the conclusion of that investigation the Senate adopted the following resolution presented by Senator Nye (see Ex. Doc. 18, Sen., 39th Cong., 1st Session):

> "In the Senate of the United States, March 9, 1865.
>
> "*Resolved*, That the Secretary of the Navy be requested to organize a board, of not less than three competent persons, whose duty it shall be to inquire into and determine how much the vessels of war and steam machinery contracted for by the department in the years 1862 and 1863 cost the contractors over and above the contract price and allowance for extra work, and report the same to the Senate at its next session. None but those that have given satisfaction to the department to be considered.

The report of this board, dated December 23, 1865, was transmitted by the Secretary of the Navy to the Senate on the 30th of January, 1866, and on the 31st of January was, by the Senate, referred to the Committee on Naval Affairs, and ordered to be printed. (See p. 518, 2d Col. of the Cong. Globe, 1st Session, 39th Congress.) It has been customary to call this the Selfridge Report because the president of the board was Commodore Thomas O. Selfridge. Its technical title is Sen. Ex. Doc. 18, 39th Congress, 1st Session.

On the 22d of March, 1866, Senator Nye, for the committee to which the Selfridge report was referred, reported a bill to the Senate (No. 220) for the relief of certain contractors for the construction of vessels of war and steam machinery, which was read and passed to a second reading. (See p. 1561, Cong. Globe, 39th Cong., 1st Session.)

Accompanying this bill was Senate Report No. 45, 39th Cong., 1st Session, the title of which is as follows:

"Thirty-ninth Congress, First Session. Senate.
Rep. Com. No. 45.
"In the Senate of the United States.

["MARCH 22.—Ordered to be printed.]

"Mr. Nye made the following—

"REPORT.

"(To accompany Bill S. No. 220.)

"The Committee on Naval Affairs, to whom was referred the communication of the Secretary of the Navy, of the date of January 30, 1866, inclosing a copy of the record of the board of Naval officers, organized pursuant to the resolution of the Senate of March 9, 1865, report:"

This report contained *inter alia* all the conclusions of the Selfridge Board, and also a table showing the prices of labor and material from January, 1862, to December, 1864, inclusive. It is printed *in toto* at pp. 1884 to 1888, Cong. Globe.

This bill (Senate 220), as it came from the Committee, proposed to pay to the contractors what the vessels cost them as found by the Selfridge Board. (See pp. 1883, 1884, 1885, Cong. Rec., 1st Session, 39th Congress.) The bill was discussed frequently and fully; as amended in and passed by the Senate, on the 27th of April, 1866, it read as follows (see p. 2232, *supra*):

> "That the Secretary of the Treasury be directed to pay, out of any money in the Treasury not otherwise appropriated, to the several parties the awards made in their favor by the naval board organized under the resolution of the Senate adopted March 9, 1865, the awards being made under date of December 23, 1865, and reported to the Secretary of theNavy: Provided, That the payment shall not, in any case, exceed

twelve per cent. upon the contract price, except in the case of the *Comanche* in which case the award shall be paid in full.

"Sec. —. And be it further enacted, That in the cases of Donald McKay, of Boston, Massachusetts, who built the *Ashuelot* and machinery, and Miles Greenwood, of Cincinnati, Ohio, who built the *Tippecanoe*, whose contracts have been completed to the satisfaction of the Department, and who were prevented from appearing before the naval board, they shall be entitled to the same rate of compensation as is authorized to be paid to other parties building the same class of vessels and machinery; and such payment to be made to them, out of any money in the Treasury not otherwise appropriated, under the supervision of the Secretary of the Navy, provided the evidence submitted for his examination fully establishes the right of the said parties to such amount of compensation.

"And be it further enacted, That the sums hereby authorized to be paid to the parties herein named shall be in full for all work done by said parties on the vessels and machinery for which said sums are respectively paid, and if accepted by any of said parties shall be on that condition; and none of said parties shall be entitled to said sums until he shall execute a receipt in full for said claim."

Senate Bill 220 was received by the House of Representatives on April 28 (p. 2251), and on May 3 was read a first and second time and referred by the House to the Committee on Claims (p. 2374). It remained in committee until the next session, and was reported by Mr. Sloan from that committee February 15, 1867, with an amendment (see p. 1265, Congressional Globe, 2d Session, 39th Congress), striking out all after the enacting clause and inserting the following substitute:

"That the Secretary of the Navy is hereby authorized and directed to investigate the claims of the

following contractors for building iron and iron-clad vessels of war and steam machinery for the same, namely: T. F. Rowland, Harrison Loring, Zeno Secor & Co., The Novelty Works, Posey, Jones & Co., William Perrine, James B. Eads, George W. Quintard, Z. & F. Secor, William Perrine and Z. & F. Secor, Alexander Swift & Co., and Niles Works, Snowden & Mason, Donald McKay, Miles Greenwood, McCord & Bestor, Donahue, Ryan & Secor, A. W. Denmead & Sons, the Stover Machine Company; and said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract, but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged time for completing the work, rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor; and from such additional cost, to be ascertained as aforesaid, there shall be deducted such sum as may have been paid each contractor for any reason heretofore, over and above the contract price; and shall report to Congress a tabular statement of each case, which shall contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and action of the Government as aforesaid, and the amount already paid the contractor over and above the contract price."

So much of the report of Mr. Sloan from House Committee on Claims (H. R. Report No. 17, 39th Cong., 2d Ses-

sion), as relates to the proposed change is set out in full at the conclusion of this brief. After numerous discussions and amendments Senate Bill 220 passed the House in the following form, on the 22d February, 1867 (p. 1478, Part 2, Cong. Globe, 2d Sess., 39th Cong.):

> "Amend the bill of the Senate by striking out all after the enacting clause, and inserting in lieu thereof the following:
>
> "That the Secretary of the Navy is hereby authorized and directed to investigate the claims of all contractors for building vessels of war and steam machinery for the same, said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required in the prosecution of the work occasioned by the Government which were not provided for in the original contract; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged time for completing the work, rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor; and from such additional cost, to be ascertained as aforesaid, there shall be deducted such sum as may have been paid each contractor for any reason, heretofore, over and above the contract price, and shall report to Congress a tabular statement of each case, which shall contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and action of the Government as aforesaid, and the amount already paid the contractor over and above the contract price."

A conference committee was appointed by both Houses which reported as follows (p. 1661, Part 3, Congressional Globe, 2d Session, 39th Congress):

"Relief of Government Contractors.

"Mr. Sloan submitted the following report:

"The committee of conference on the disagreeing votes of the two Houses on the bill (S. No. 220) for the relief of certain contractors for the construction, of vessels of war and steam machinery having met after full and free conference, have agreed to recommend, and do recommend, to their respective Houses, as follows:

"That the Senate agree to the House amendment, with the following amendments:

"After the word 'same' in the fourth line insert the words 'under contracts made after the 1st day of May, 1861, and prior to the 1st day of January, 1864.'

"Add to the House amendment the following amendments:

"Provided, That the Secretary of the Navy, under the resolution, shall investigate the claim of W. H. Webb for constructing the steamer *Dunderburg*, applying the provisions of this resolution in such investigation, except that proper consideration shall be given to the increased cost incurred by said Webb by reason of any alteration in the plans and specifications for the *Dunderburg* made during the progress of the work, whether such alterations were provided for in the original contract or not, when payment for the same was not embraced in the contract price.

J. C. SLOAN,
C. DELANO,
Managers on the part of the House.
T. A. HENDRICKS,
H. B. ANTHONY,
W. T. WILLEY,
Managers on the part of the Senate."

The conference report was adopted by both Houses and the bill became a law on the 2d of March, 1867 (see 14 Stat. 424), reading as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Navy is hereby authorized and directed to investigate the claims of all contractors for building vessels-of-war and steam machinery for the same under contracts made after the first day of May, eighteen hundred and sixty-one, and prior to the first day of January, eighteen hundred and sixty-four, and said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract; but no allowance for any advance in the price of labor or material shall be considered, unless such advance occurred during the prolonged time for completing the work rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advances could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor, and from such additional cost, to be ascertained as aforesaid, there shall be deducted such sum as may have been paid each contractor for any reason heretofore over and above the contract price, and shall report to Congress a tabular statement of each case, which shall contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and action of the Government aforesaid, and the amount already paid the contractor over and above the contract price: *Provided*, That the Secretary of the Navy, under the resolution, shall investigate the claim of W. H. Webb for constructing

the steamer *Dunderburg*, applying the provisions of this resolution in such investigation, except that proper consideration shall be given to the increased cost incurred by said Webb by reason of any alteration in the plans and specifications for the *Dunderburg* made during the progress of the work, whether such alterations were provided for in the original contract or not, when payment for the same was not embraced in the contract price.

"Approved, March 2, 1867."

This act was an elaboration of the joint resolution of June 25, 1864, for the relief of John Ericsson (13 Stat. 409), which recited that improvements were made in consequence of service of other vessels in actual conflict, and provided for the purchase from John Ericsson by the Government of the impregnable floating battery, the *Puritan*, at her actual cost.

Soon after its enactment Congress appropriated one hundred and seventy-nine thousand dollars to pay for losses sustained by the contractors in building the monitor *Camanche* (Act of March 30, 1867, 15 Stat. 353).

The Secretary of the Navy did not undertake to personally investigate the claims of all contractors for building vessels of war, and called to his assistance a board of naval officers composed of Commodore Marchand, Chief Engineer J. W. King and Paymaster Edward Foster. Their report, dated November 26, 1867, was transmitted to the Senate by the Secretary of the Navy December 4, 1867, and was numbered Senate Ex. Doc. No. 3, 40th Congress, 2d Session.

The act of Congress had called for a tabular statement of each case containing; (1) the name of the contractor; (2) a description of the work; (3) the contract price; (4) the whole increased cost of the work over the contract work; (5) and the amount of such increased cost caused by the delay and action of the Government as aforesaid; (6) and the amount already paid the contractor over and above the contract price.

The report of the Marchand Board transmitted to the Senate by the Secretary of the Navy consisted almost entirely of a tabulated statement. In it are found columns headed as follows (1) name of contractor; (2) description; (3) contract price; (4) whole increased cost of the work over the contract price *as claimed by the contractors*; (5) amount of such increased cost caused by the delay and action of the Government as determined by the board *to be due*; (6) amount already paid the contractors over and above the contract price.

The Board said, *inter alia*, nothing was due on the *Squando*, the *Nauset* and *Ashuelot*, and Donald McKay and his fellow-contractors thereafter sought patiently and indefatigably the relief held out to them by Congress, and denied by the Marchand Board.

At the Second Session of the 40th Congress, on the fifth of February, 1868, Senator Drake offered a Joint Resolution (p. 981, Cong. Globe) No. 100, looking to a reference of the subject to the Court of Claims. This resolution passed the Senate (p. 3150, Cong. Globe, 2d Session, 40th Cong.), but was not reached in the House. At the Second Session of the 41st Congress Senator Drake offered Senate Joint Resolution No. 92, which, after passing both houses, was vetoed by President Grant. The veto message is as follows: See Richardson's Messages and Papers of the Presidents, Vol. VII, p. 125, and p. 1023, Congressional Globe, 3d Session 41st Cong., Part 2.

> "EXECUTIVE MANSION, February 7, 1871.
>
> "*To the Senate of the United States:*
>
> "I hereby return without my approval Senate resolution No. 92, entitled "resolution for the relief of certain contractors for the construction of vessels of war and steam machinery," for the following reasons:
>
> "The act of March 2, 1867, 14 U. S. Statutes at Large, p. 424), directs the Secretary of the Navy—
>
> 'to investigate the claims of all contractors for

building vessels of war and steam machinery for the same under contracts made after the 1st day of May, 1861, and prior to the 1st day of January, 1864; and said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged time for completing the work rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor.' . . .

"The present joint resolution transfers the investigation to the Court of Claims, and repeals 'so much of said act as provides against considering any allowance in favor of any such parties for any advance in the price of labor and material, unless such advance could not have been avoided by the exercise of ordinary diligence and prudence on the part of the contractor.' It seems to me that the provision thus repealed is a very reasonable one. It prevents the contractor from receiving any allowance for an advance in the price of labor and material when he could have avoided that advance by the exercise of ordinary prudence and diligence. The effect of the repeal will be to relieve contractors from the consequences of their own imprudence and negligence. I see no good reason for thus relieving contractors who have not exercised ordinary prudence and diligence in their business transactions.

"U. S. GRANT."

The Senate Joint Resolution No. 92, was as follows (See Congressional Globe of July 8, 1870, p. 5368, 2d Session, 41st Congress, Part p. 6, 1869–70):

> "That the claims for building vessels of war and steam machinery, referred to in the act for the relief of certain contractors for the construction of vessels of war and steam machinery, approved March 2, 1867, be referred to the Court of Claims, which is hereby vested with jurisdiction under said act, and whose duty it shall be to investigate and determine the claims of the several parties upon the principles and rules laid down in said act, except as hereinafter provided; and the finding of said court in the premises shall have the same force and effect as any other judgment of said court; but no claim shall be considered by said court unless the same be presented therein within one year after the passage of this resolution; and so much of said act as provides against considering any allowance in favor of any such parties for any advance in the price of labor or material, unless such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor, be and the same is hereby repealed."

At the December term, 1873, the Court of Claims decided, in the McCord Case, 9 C. C. 155, that nothing was due the contractor for the Monitor *Etlah* for the increased cost caused by the United States. Its legal conclusion agreed with that of the Marchand Board, which found that there was nothing "due" to McCord for the *Etlah*. But the court did what the Marchand Board had refused. It found, as a fact, that the increased cost to the contractor caused by the delay and action of the Government remaining unpaid was $174,445.75 (see pp. 157, 158, 9 C. C.), vindicating the assertions of this class of claimants that the Marchand Board, by the addition of a few words to the titles of their tabulated statement, had avoided compliance with the Act of March 2, 1867. On March 3, 1873, the 42d Congress

referred the claim of Miles Greenwood to the Court of Claims in the language of the Act of March 2, 1867 (17 Stat. p. 764). The judgment rendered, $76,730, by the Court of Claims (14 C. C. p. 597), again showed that Commodore Marchand and his fellow officers had in mind "what the board determined to be due," rather than the instructions of Congress, requiring them to report the facts.

The 42d Congress also appropriated directly to the heirs of George C. Bestor $125,000 for the *Shiloh* (17 St. 733), which had been similarly rejected by the Marchand Board. It also appropriated fifty thousand dollars (Act of June 1, 1872, 17 Stat. 671) to pay Charles W. Whitney, and twenty-three thousand three hundred and ten dollars to pay J. S. Underhill (Act of June 10, 1872, 17 Stat. 691) for the *Keokuk*; and the 43d Congress appropriated forty-six thousand seven hundred and fifteen dollars and eight cents to pay Daniel S. Mershon, Jr., for the *Cimarron* (Act of March 2, 1875, 18 Stat. 635). The *Keokuk* and *Cimarron* were not considered by the Marchand Board "as within its province." At the October Term, 1877, this court, in the Chouteau Case, 95 U. S. 61, affirmed the decision of the Court of Claims in McCord *vs.* United States, 9 C. C. 155.

After the veto by President Grant there seems to have been no united effort to re-enact or to enforce the Act of March 2, 1867, and after the passage of the Cimarron Act there was no legislation for the relief of any of the gunboat contractors until the enactment by the 51st Congress of the law now under consideration. Its legislative history is very simple. It was introduced in the Senate, was favorably reported from the Senate Committee on Claims, passed the Senate unanimously, passed the House without amendment and became a law August 30, 1890, in the exact terms in which it was first presented in the Senate. The report of Senator Higgins (Senate, 444, 51st Cong. 1st Session) reproduced the Marchand Report (Senate, Ex. Doc. No. 3, 40th Cong. 2d Session) in full, and was devoted largely to showing

that that board had not complied with the requirements of the Act of March 2, 1867, and that the relief contemporaneously held out to these claimants was still denied to them.

The Act of March 2d, 1867, (14 Stat. 424) has never been repealed. Donald McKay and others claimed that it had never been executed. At every Congress from the 38th to the 51st inclusive, the claims of this class of contractors have been considered by the legislature. At nearly every Congress some action has been taken on this class or upon individuals belonging to the class.

The words "prolonged term" to which the attention of the court is invited by the appellants is first found in the amendment reported by Mr. Sloan on the 15th of February, 1867. Senate Bill 220, 39th Congress, as it passed the Senate had for its foundation the action of the Selfridge Board in ascertaining—

> "how much the vessels of war and steam machinery . . . cost the contractors over and above the contract price and allowance for extra work."

The House substitute had for its central idea the additional cost which the *Government imposed* upon the contractors. This distinction was clearly pointed out in the report of Mr. Sloan's committee. This report was printed on the 14th of February, 1867, was read on the floor of the House (p. 1265, Cong. Globe, 2d Session, 39th Cong.), and thereafter was accessible to every member of the House and Senate. It was not conclusive as to the reasons animating Congress in the passage of the acts of 1867 and 1890, but it was a clear explanation to every member who chose to read it of the motives animating the draftsman of the House amendment, and was an announcement of the reasons for the enactment of the substitute recommended by the committee.

There were, says the Sloan report, two separate grounds for relief presented by the contractors.

> "(1.) By reason of the delays thus caused by the

> omissions and action of the Government, the claimants, owing to the constantly increasing prices of labor and material *during the progress of the work*, have incurred great loss in the performance of their contracts. (2.) Although no delays were caused by the Government, the contractors lost because they could not foresee the rise in prices and materials."

The report says:

> "The Committee are of opinion that the first ground upon which these claims are based is valid, and furnishes a legal and just rule for the relief of the claimants."
>
> "The committee have also arrived at the conclusion that the claimants are not entitled to relief upon the second ground stated."

The latter conclusion of the committee led to the rejection by the House of the bill as it passed the Senate; the former to the preparation of the substitute. Now, it is clear that the committee had in mind that only such enhancement in prices should be paid for as was caused by the Government, and (second) that the time necessary for completing the vessels should be prolonged by delay resulting from the action of the Government and not by the action of the contractors; and there was no just or equitable reason to distinguish between advances to the end of the contract term and advances that occurred after the expiration of that time, provided the loss was caused by the Government. Increased cost to the contractors not due to the action of the Government was what they sought to exclude, and not advances that occurred at any time during the progress of the work.

In United States *vs.* Wong Kim Ark, 169 U. S. 649 at p. 699, Mr. Justice Gray in delivering the opinion of the court, said, that while debates in Congress are not admissible in

evidence to control the meaning of a statute the remarks in debate are—

> "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."

The Chief Justice and Justice Harlan, while disagreeing with the majority as to the judgment to be rendered, were in accord as to the utility of consulting the Congressional Debates (p. 721).

II.

The Plain Language of the Statute.

It appears from the findings in this case that the contractual term for completing the contracts was eleven months (Findings I and II) from August 22, 1863, and that but for the acts and delays of the Government no longer time would have been necessary. It is equally clear that a longer period was, by the Government, rendered necessary for the completion. The prolongation of the period was from July 22, 1864, to November 29, 1865, or a period of sixteen months and seven days. The whole period actually necessary for the completion of the vessel was twenty-seven months and seven days, and this was the prolonged period necessary to complete the vessel, and was rendered necessary by the Government; the sixteen months and a half was not the prolonged period, it was the prolongation of the period. The draftsman recognized the distinction between the actor and thing acted upon in that very sentence, when he speaks of the "advance" in the price of labor instead of saying the "advanced price." If he had meant to exclude from the allowance the contract term, it would have been most natural and most grammatical to have said:

> "But no allowance for any advance in the price of labor or material shall be considered which did not

> occur during the *additional* time for completing the work rendered necessary by delay."

It was held, in United States *vs.* Goldenberg, 168 U. S. 95, p. 103, that the lawmaker is presumed to know the meaning of words and the rules of grammer.

It is clear that in the present case he knew the difference between "advance in price" and "advanced price," and also between "prolonged term" and "prolongation of the term," and that he used the words "prolonged term" advisedly so as to give to the claimant all the increased cost measured by the advance in prices which was necessarily incurred by the contractor by reason of the acts or delays of the Government, if these delays were so appreciable as to prolong the time necessary to complete, and if the contractor could not have avoided the advance by the exercise of ordinary prudence and diligence.

This was doing no injustice to the United States and was a very different thing from reimbursement for the advance in price which fell upon every contractor who agreed during the early part of the war to manufacture for the Government or for any other customer. The basis for the investigation of the claim was limited to the additional cost necessarily incurred by reason of the changes ordered and delays caused by the United States. This excluded all enhancement in cost by reason of advance in prices if not consequent upon the action of the Government, and the clause in controversy being the only one which mentions advance in price may have been inserted partly by abundance of caution to show that the advance in price was in the mind of the law-maker and was part of the cost to be considered by the Marchand Board and by the Court of Claims in the investigation.

Mr. Justice Field, in Bernier *vs.* Bernier, 147 U. S. 242 (p. 246), said:

> "All acts of the legislature should be so construed, if practicable, that one section will not defeat or

> destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act."

The construction contended for by the Attorney General does violence to the general purpose of the statute, and no good reason is suggested for any desire on the part of Congress to make the distinction he contends for.

It may be said in passing that the contracts in this case (pp. 3 to 10), contained no provision giving to the United States the right to make changes as in the (McCord) Chouteau case, 95 U. S. 61.

III.

Dictum of Lawrence Case.

This statute had been before the Court of Claims on two previous occasions. The claim of Nathaniel McKay for the *Squando* is reported in 27 C. C. 422, and the claim of the appellee for the *Nauset* was decided in 1895, but not reported (for findings and judgment see additional Record, pp. 2 to 12). In both cases upon this branch of the statute the court rendered a general rather than a special verdict. In the Nathaniel McKay case the language is (see p. 427):

> "The cost to said contractors because of the enhanced price of labor, which occurred during the prolonged term for completing the work is the sum of $60,462.

In the Nauset Case, Donald McKay's executor (Additional Rec., p. 10), the finding is:

> "The cost to the contractor because of the enhanced price of labor and material which occurred during

the prolonged term for completing the work is $61,571.67."

There was no opinion in the Nauset case and the opinion in the Squando case is silent upon the present controversy. In the Lawrence case, 32 C. C. 245, where a suit was brought in the Court of Claims under a relief statute identical in its terms with the Act of August 30, 1890, the Chief Justice of the Court of Claims delivered an opinion in which he says that in preceding cases the construction had been put upon the statute that the appellants are now contending for. There is no reason to doubt the correctness of this recital as to the case of Nathaniel McKay (27 C. C. 422). But the reverse was the case in the Nauset suit (See XII, finding, p. 12, Additional Record), and this error would not have crept into the opinion of the Chief Justice, if the question we are discussing had been presented for investigation in the Lawrence case. The order in which the judgments were entered is as follows:

June 27, 1892, Nathaniel McKay for the *Squando*. January 21, 1895, Bliss Exr. of Donald McKay, for the *Nauset*. February 23, 1897, Courtenay, Admr. of Lawrence for the *Wassuc*. April 18, 1898, Bliss, Exr. of Donald McKay for the *Ashuelot*.

Slight scrutiny of the Lawrence decision (32 C. C. 245) will show that the controversy was between two successive contracts for the same work, and that there was no finding by the Court of Claims (32 C. C., pp. 246 to 254) upon which that court or this could have based a judgment if it had been of opinion that the prolonged term was composed of the contract term and the necessary additional time. If on appeal of that case this court had regarded the "prolonged term" as commencing with the end of the contract period and had disagreed with the court below as to which agreement controlled, the findings would have sustained a

judgment. But either because the evidence was not before the court to enable the court to say what was the enhanced cost from rise in prices, upon our present contention, or because the court did not consider the question before it, the findings (which are the voice of the whole court), are silent as to both contracts. These findings were in accordance with Rule 1, Par. 2 of the order of this court, in reference to appeals from the Court of Claims, requiring a finding "of the facts in the case established by the evidence in the nature of a special verdict."

The XV finding (p. 253, 32 C. C.), presents all the alternatives of which, in the judgment of the court, the evidence required consideration. They are, first, that if the prolonged period commenced February 3, 1864, the termination of the first contract period, the increased cost of labor was $36,440.01, and of materials was $55,540.50; and, second, if the prolonged term began July 4, 1864, the termination of the second contract period, nothing should be allowed. As to what would have been the enhanced cost if the prolonged period had included the contract period under either agreement the findings were silent.

In the present case the court below, including the Chief Justice, regarded all of the opinion in the Lawrence case that bears on the present discussion as *dicta* because the very point now presented for discussion did not in that case require consideration. In so doing they committed no error.

Cohens *vs.* Virginia, 6 Wheaton, 264, 399.
United States *vs.* Wong Kim Ark, 169 U. S. 649, 679.

IV.

Conclusiveness of Judgment in the Nauset Case.

Under this statute, Edward P. Bliss, executor of Donald McKay, the present appellee, brought suit in the Court of

Claims for the additional cost to the *Nauset*, and a final judgment was rendered in his favor in 1895 for $101,529.73. Of this sum $61,571.67 was for enhanced cost of labor during the prolonged term, etc. In that cause the question of when the prolonged term commenced was considered by the court on two occasions, first at the trial and second on the motion of Assistant Attorney General Dodge, who made the specific proposition now presented by the United States, to wit, that the prolonged term did not commence until the end of the contract term (finding IX, pp. 1 and 2, Addl. Rec.) There is not the slightest controversy between the appellee and the appellants (see finding XII, p. 12, Addl. Rec.), that there was a final judgment upon this precise question in which the court below carried back the commencement of the prolonged period very far into the contract term. If the United States had desired to review that decision it could readily have done so by obtaining from the Court of Claims additional findings, or, if necessary, by applying to this court for a *mandamus* to separate the finding X, at page 10 of the Additional Record.

> Cromwell *vs.* County of Sac, 94 U. S. 351 and see Southern Pacific Railroad Company *vs.* United States, 168 U. S, p. 1, and cases cited at p. 49, *et sequentur.*

It was not necessary to plead the former judgment, but it could be introduced as evidence under the general issue.

> P. 101, Aurora City *vs.* West, 7 Wall. 82.

Besides, the Court of Claims is not bound by any special rules of pleading.

> United States *vs.* Burns, 12 Wallace, 246.

For the conclusiveness of judgments in the Court of Claims, see p. 647 in United States *vs.* O'Grady, 22 Wall. 641. Indeed, it is the finality of the unappealed judgments

of that court that causes this court to entertain appeals from it.

See p. 479 in United States *vs.* Jones, 119 U. S. 477.

As it would not be proper for the Supreme Court to review its former interpretation of the law in a case a second time before it (see Chaffin *vs.* Taylor, 116 U. S. 567), so the Court of Claims did not err in following in this case its interpretation of the words "prolonged term" in this statute in a former suit between the same parties.

JOHN S. BLAIR,
Attorney for Appellee.

APPENDIX.

"Thirty-ninth Congress, Second Session. House of Representatives. Report No. 17.

"CONTRACTORS FOR WAR VESSELS.

"[To accompany Bill S. No. 220.]

"FEBRUARY 14, 1867.—Ordered to be printed.

"Mr. SLOAN, from the Committee of Claims, made the following—

REPORT.

"**The Committee of Claims, to whom was referred Senate Bill 220, for the relief of certain contractors for the construction of vessels of war and steam machinery, having had the same under consideration, report:**

"That said bill grants relief to more than forty contractors, who claim that they have sustained damage and suffered loss in the execution of their contracts with the government.

"These claims for relief are based, so far as ascertained, upon two separate grounds.

"1. That, by the terms of the contracts, the government was required to furnish plans and working drawings as fast as required by the contractors, during the progress of the work; that in many of the cases the government failed to furnish the plans and drawings as soon as needed, and that the work was suspended for longer or shorter periods of time in the different cases in consequence thereof; that owing to imperfectly formed plans for the construction of the new class of vessels required, and that the building of such vessels was of necessity, in a great degree, experimental, the government ordered, in many cases, material and important alterations in the plans and specifications for building the vessels and machinery during the process of construction, which also caused delays in the fulfilment of the contracts. And, although the Navy Department has undertaken to pay for all alterations thus made, the amount allowed was insufficient to make good

the loss sustained by the claimants in consequence thereof. And that, by reason of the delays thus caused by the omissions and action of the government, the claimants, owing to the constantly increasing prices of labor and materials during the progress of the work, have incurred great loss in the performance of their contracts.

"2. That these contracts were made during the early part of the war, and before it had produced any advance in the prices of labor and materials, and when it was difficult, if not impossible, to foresee its long continuance or its effects in increasing prices. That these claimants went on and fulfilled their contract after it became apparent that to do so would involve them in loss, relying upon the justice and generosity of the government to save them from loss thus incurred in completing vessels which were indispensable for the government in prosecuting the war to a successful termination.

"The committee are of opinion that the first ground upon which these claims are based is valid, and furnishes a legal and just rule for the relief of the claimants. Nearly all of these contracts require the work to be done in accordance with plans and specifications prepared by the government and stated in the contracts to be annexed thereto. And we think that it was the duty of the government (except in one or two instances), to furnish all the plans and drawings necessary for the prosecution of the work as fast as needed, and if loss was occasioned to the contractors by the delay of the government in this regard, it is legally liable to indemnify them for such loss, and that the government is also liable to pay the necessary increased cost of any alterations in construction caused by its subsequent action, not provided for in the contracts. The committee, however, do not express any opinion as to whether the amounts already allowed and paid to tl e claimants by the Navy Department on this account, have been sufficient to indemnify them for such loss and damage. This can only be ascertained by a full investigation of each case.

"The committee have also arrived at the conclusion that the claimants are not entitled to relief upon the second ground stated, and that there is no principle upon which the government can be called upon to indemnify contractors for loss which they may sustain in the performance of their contracts in consequence of an advance in the prices of labor and materials. This is a risk which contractors clearly take, and by the consequences of which they must abide. A number of cases have already been presented to the committee, claiming damages by contractors with the government arising from the increased price of labor and materials during the time in which the contract was to have been performed; but the committee have uniformly rejected such claims, where the government did not cause the delay in the fulfilment of the contract. To establish a different rule would be to subject the government to a claim for damage on almost every case of contract during the rebellion, when the contract has not proved as profitable to the contractor as he anticipated. Indeed, it would convert the government into an insurer to the contractor that he should in no case suffer any loss, but should be certain to enjoy all the advantage of a favorable agreement. This rule would, in the opinion of the committee, subject the government to a large number of claims for damages not embraced in the class now under consideration, and would lead to a probable liability large enough to be dangerous and alarming.

The committee are further satisfied that the rule of relief adopted by the Senate bill 220, is partial and unjust, both to the claimants and the government. There was, as before stated, over forty of these claims in which relief is granted by this bill; there are two other claims of the same kind provided for by a subsequent resolution of the Senate, for the relief of McCord and Bestor, of St. Louis; and a number of others have been presented to the

committee, not otherwise acted upon, and it is understood that there are still others which will be presented if favorable action is taken on those before the committee. But they are all cases of distinct contracts between the government and different contractors, and have no proper connection, except in the fact that several classes of work are provided for, and the contracts are all for work in one of the classes; but the circumstances of failure to furnish the plans and drawings, and the periods of such failure and the alterations ordered by the government, and upon which the committee think the claim for relief can alone be based, are different in different cases. The committee think a proper determination of these claims requires that each case shall be examined separately, and the amount of loss for which the government is justly liable awarded without regard to the action taken in other cases, except so far as the principle governing the allowance may be applicable. A board of naval officers was, by resolution of Congress, authorized and required to investigate and report the excess of cost of the work over the contract price in each of these cases. The report made by such board shows that the losses sustained by different contractors in the construction of the same class and kind of work, under contracts executed at about the same time and for about the same price and amount of work, varies greatly."

UNITED STATES v. BLISS.

APPEAL FROM THE COURT OF CLAIMS.

No. 394. Submitted December 12, 1898. — Decided January 3, 1899.

The appellee's testator contracted with the United States in 1863 to construct war vessels. Owing to changes in plan and additional work required by the Government, the time of the completion of the work was prolonged over a year, during which prices for labor and materials greatly advanced. Full payment of the contract price was made, and also of an additional sum for changes and extra work. In 1890 Congress authorized the contractor's executor to bring suit in the Court of Claims for still further compensation. The act authorizing it contained this proviso: "Provided, however, That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draught monitors Squando and Nauset and the side-wheel steamer Ashuelot in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: Provided, That such additional cost in completing the same, and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work, were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid; and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors." *Held*, that the petitioner's right of recovery for advance in prices was limited to the prolonged term, and the Court of Claims could not consider advances which took place during the term named in the contract.

If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this, although such prior judgment may have been rendered by the same court.

On August 22, 1863, Donald McKay contracted with the United States for the construction of the gunboat Ashuelot, the contract to be completed in eleven months from that date. On account of changes and additional work required by the Government, and other details for which it was responsible,

the completion of the vessel was delayed from July 22, 1864, to November 29, 1865, a period of sixteen months and seven days beyond the contract term. Full payment of the contract price was made and also of an additional sum for changes and extra work. On August 30, 1890, Congress passed an act, 26 Stat. 1247, c. 853, submitting to the Court of Claims the claims of the executors of Donald McKay for still further compensation. Such act contains this proviso:

"Provided, however, That the investigation of said claim shall be made upon the following basis: The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draught monitors Squando and Nauset and the side-wheel steamer Ashuelot in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: Provided, That such additional cost in completing the same, and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work were occasioned by the Government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors."

Under this act this suit was brought. Upon the hearing the Court of Claims, in addition to the facts of the contract, performance, time of completion and payment, found that —

"During the contract period of eleven months, and to some extent during the succeeding sixteen months and seven days, the Government made frequent changes and alterations in the construction of the vessel and delayed in furnishing to the contractor the plans and specifications therefor, by reason of which changes and delay in furnishing plans and specifications the contractor, without any fault or lack of diligence on his part, could not anticipate the labor, nor could he know the

kind, quality or dimensions of material which would be made necessary to be used in complying with said changes:

"While the work was so delayed during and within the period of the contract as aforesaid the price of labor and material greatly increased, which increased price thereafter continued without material change until the completion of the vessel sixteen months and seven days subsequent to the expiration of the contract period. The increased cost to the contractor as aforesaid was by reason of the delays and inaction of the Government and without any fault on his part:"

And rendered judgment in favor of the petitioner for, among other things, the increased cost of the labor and material furnished by him, consisting of two items of $12,608.71 and $14,815.66. From this judgment the United States appealed to this court.

Mr. Assistant Attorney General Pradt and *Mr. Charles C. Binney* for appellants.

Mr. John S. Blair for appellee.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

No question is made except as to so much of the judgment as is for the increased cost of labor and material. The allowance for that is challenged under the clause of the act of 1890, "but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the Government aforesaid." The finding is that there was an advance in the price of labor and material during the contract term of eleven months, and that such increased price continued thereafter without material change during the sixteen months and seven days between the close of the contract term and the actual completion of the vessel. Of course, but for the act of August 30, 1890, no action could be maintained against the

Government. The statute of limitations would have been a complete defence. The petitioner's right, therefore, is measured, not by equitable considerations, but by the language of that statute. Beyond that the court may not go. If equitably the petitioner is entitled to more compensation, it must be sought by direct appropriation or further legislation of Congress.

It seems to us clear that the Court of Claims was not permitted to consider any advance in the price of labor or material during the term named in the contract, to wit, eleven months. Evidently Congress thought that the contractor took the risk of such advance when he signed the contract. The contract term is one thing; the prolonged term another. If Congress intended to allow for all advances in the price of labor or material at any time between the execution of the contract and the completion of the work, the proviso quoted was unnecessary. The fact that the proviso discriminates as to the term, an advance during which entitles to allowance, is conclusive upon the question. There are no terms to be distinguished except the contract term of eleven months and the subsequent prolonged term of sixteen months and seven days. Of course, no change in the price of labor and material after the work was finished could have been considered, and if Congress intended to either permit or forbid an allowance for any advance in the price of labor and material during the entire progress of the work, it was easy to have said so. That it qualified such a general provision by limiting it to a particular term, and that term one created by the action of the Government, excludes all doubt as to the meaning of the words "prolonged term." Obviously the petitioner himself understood that they refer to the period commencing at the time fixed in the contract for the completion of the work, for in his petition it is said that "during the term specified by the contract, and also through the prolonged term, there was a continuous rise in the prices of all labor and material entering into said vessel and machinery." He did not then doubt the meaning of the statute, and the only difficulty is that according to the findings of the Court of Claims his proof did

not establish all his allegations. We deem it unnecessary to follow the investigation made by counsel of the various proceedings before Congress to see if there cannot be disclosed some unexpressed intent on its part to authorize payment for every advance in the cost of labor and material. The language of the act is too plain to justify such investigation.

One other matter requires consideration: Attached to the record certified to us by the Court of Claims is a stipulation signed by the counsel for both parties, which stipulation commences in these words:

"It is hereby agreed by and between the parties to this cause that the following facts appear in the records of the Court of Claims, and that they may be added to the record in this cause and be treated upon the hearing with the same effect as if they had been included in the facts found by the Court of Claims."

This stipulation seeks to introduce into the record of this case the proceedings of the Court of Claims in another suit brought under the same act of 1890, by the same petitioner, to recover additional compensation for the construction of a vessel other than the one described in the present suit, and this notwithstanding that this court is, at least in other than equity cases, limited to a consideration of the facts found by the Court of Claims. This additional record contains the findings of facts in that case, the conclusion and judgment, which was in favor of the petitioner, and states that such judgment was not appealed from by either party. The tenth finding of fact reads as follows:

"The cost to the contractor because of the enhanced price of labor and material which occurred during the prolonged term for completing the work is $61,571.67. Said prolonged term resulted from the delays of the defendants. The exercise of ordinary prudence and diligence on the part of the contractor would not have avoided said enhanced price of material and labor."

The final clause in this stipulation of counsel seeks to explain this tenth finding in this way:

"The $61,571.67 set forth in the tenth of the final findings

in the *Nauset case* (see X finding above) was composed of $24,634 enhanced cost after February 10, 1864, the expiration of the contract term for the construction of the Nauset, and the remainder, $36,937.67, was enhanced cost of labor and material furnished by Donald McKay within the contract term (June 10, 1863, to February 10, 1864), but the court did not separate the allowance in its findings."

Upon this the doctrine of *res judicata* is invoked to uphold the judgment. A sufficient answer is that neither by pleadings nor evidence were the proceedings in this other case brought before the Court of Claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court. *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, suggests nothing contrary to this, for there the prior judgment was offered in evidence, and the only question considered and decided by this court was the effect of an alleged failure to fully plead *res judicata*.

But further, not only did the petitioner fail to either plead or prove the former judgment, but also the record when produced disclosed that the court found that the advance in price was during the prolonged term. Counsel propose by stipulation to change that finding so as to make it show that part of the sum named therein was for the advance during the contract term, and the other part for the advance during the prolonged term. In other words, counsel seek without pleading or proof to use a prior judgment as *res judicata*, and also by stipulation to change the findings of fact which were made in that case. It is clear this cannot be done.

The judgment of the Court of Claims will be reversed, and the case remanded to that court with directions to enter a judgment for the claimant, less the two amounts of $12,608.71 *and* $14,815.66, *the increased cost of labor and material.*